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MAKING INTERNATIONAL SENTENCING RELEVANT IN THE DOMESTIC CONTEXT: LESSONS FROM UGANDA

Maureen Owor

A dissertation submitted to the University of Bristol-United Kingdom, in accordance with the requirements of the degree of Doctor of Philosophy in the Faculty of Social Sciences and Law.

School of Law, May 2009

85,451 words

ABSTRACT

This thesis is about achieving local procedural legitimacy through fair, culturally relevant sentencing procedures. Its scope, is reconciling international due process guarantees and a traditional notion of rights, in sentencing procedures of the International Criminal Court.

My interest in this topic arose from the 2003 Uganda Law Reform Commission study on sentencing legislation reforms. There, participants regarded clan courts as functional in rural areas, because they had more informal, conciliatory sentencing processes than the 'alien' national courts. I later became aware that incorporation of traditional restorative processes may also help solve problems of legitimacy at the international level, as manifested in the case of Joseph Kony, discussed in Chapter 1 of this thesis.

I then investigate whether the international sentencing framework could accommodate features of traditional restorative process despite incongruent standards, and if so, how this could be achieved. I argue that procedural rights ought to underpin this reconciliation, harnessing aims of international criminal justice with traditional restorative justice.

Through my translation model, I propose small structural changes to international sentencing practice, and doctrinal reforms based on precedent. Using critical legal analysis and a small empirical study, the thesis demonstrates how translation could achieve just, culturally apposite sentencing outcomes. The International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone provide insight into challenges to accommodating African normative standards. Nominal guidance from the African human rights mechanism and national courts, on an African notion of procedural fairness, further complicates this reconciliation. I conclude that we could translate laws across divergent legal systems, drawing from experiences of clan courts that assimilate legal structures and concepts from national courts. Major international instruments: Rome Statute 1998, United Nations International Covenant on Civil and Political Rights 1966 and the African Charter on Human and Peoples' Rights 1981, are evaluated against this model.

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AUTHOR'S DECLARATION

I declare that the work in this dissertation was carried out in accordance with the Regulations of the University of Bristol. The work is original, except where indicated by special reference in the text, and no part of the dissertation has been submitted for any other academic award. Any views expressed in the dissertation are those of the author.

Maureen Owor 27th May 2009

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ABBREVIATIONS

ACHR	American Convention for Human rights
ACHPR	African Court for Human and Peoples' Rights
ACJHR	African Court of Justice and Human Rights
AFRC	Armed Forces Revolutionary Council
AG	Attorney General
AJIL	American Journal of International Law
AU	African Union
CDF	Civilian Defence Forces
DPP	Director of Public Prosecutions
EACA	East African Court of Appeal
EAJPHR	East Africa Journal of Peace and Human Rights
EALR	East African Law Reports
ECHR	European Convention for Human Rights
ECtHR	European Court of Human Rights
HCB	High Court Bulletin
IACtHR	Inter American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICLQ	International and Comparative Law Quarterly
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
ILC	International Law Commission
ILM	International Law Materials
ISS	Institute of Security Studies
JA	Justice of Appeal
JSC	Justice of the Supreme Court
JICJ	Journal of International Criminal Justice
LC	Local Council
LRA	Lord's Resistance Army
MCA	Magistrates' Courts Act
NCG	Nordic Consulting Group
OAU	Organisation of African Unity
PCA	Penal Code Act
RPE	Rules of Procedure and Evidence
RUF	Revolutionary United Front
SCSL	Special Court for Sierra Leone
TIA	Trial on Indictments Act
UDHR	United Nations Declaration of Human Rights
UHRC	Uganda Human Rights Commission
ULRC	Uganda Law Reform Commission
UN	United Nations
UNAFRI	United Nations African Institute for Prevention of Crime and Treatment of Offenders
UNESCO	United Nations Educational Scientific Cultural Organization

PRIMARY SOURCES

United Nations Charter (1945)
Universal Declaration of Human Rights (1948)
International Covenant on Civil and Political Rights (1966)
Human Rights Committee *ICCPR General Comment 13: Equality before the courts and the right to a fair trial and public hearing by an independent court established by law (Article 14)*, (1984)
Vienna Declaration and Programme of Action (1993)
International Covenant on Economic, Social and Cultural Rights (1966)
UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985)
UN Basic Principles on the use of Restorative Justice Programmes in Criminal Matters (2002)
Rome Statute of the International Criminal Court (1998)
Rules of Procedure and Evidence of the International Criminal Court (2000)
The African Charter on Human and Peoples' Rights (1981)
Constitutive Act of the African Union (2001)
Principles and Guidelines on the right to a Fair Trial and Legal Assistance in Africa, (2003)
Protocol on the Statute of the African Court of Justice and Human Rights (2008)
Statute for the Special Court for Sierra Leone (2000)
Rules and Procedure of the Special Court for Sierra Leone (2004)
Statute of the International Court for the former Yugoslavia (1994)
Rules of Procedure and Evidence of the ICTY (1994, Revised November 2008)
Statute of the International Court for Rwanda (1995)
Rules of Procedure and Evidence of the ICTR, (1994, Revised November 2006)

Rwanda
Organic Law No.16/2004 of 19/6/2004 establishing the organisation, competence and functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity committed between October 1, 1990 and December 31 1994.

Uganda
Advocates Act Cap 267, 2000
Anti-Terrorism Act 14 of 2002
Children Act, Cap 59, 2000
Civil Procedure Act Cap 71, 2000
Community Service Act, Cap 115, 2000
Constitution of Uganda Cap 1, 2000
Constitution (Amendment) Act No.2/2005
Criminal Procedure Code, Cap 116 2000
Customary Marriages (Registration) Act Cap 248, 2000
Evidence Act, Cap 6, 2000
Judicature Act Cap.13, 2000
Judicial Service Act Cap 14, 2000
Local Government Act, Cap 243, 2000
Local Councils Courts Act, Act 13 of 2006
Magistrates Courts Act, Cap 16 2000

Magistrates' Courts (Amendment) Act, (No 7/ 2007)
Penal Code Act Cap 120, 2000
Prisons Act 17 of 2006
Trial on Indictments Act, Cap 23, 2000
Uganda Human Rights Commission Act, Cap 24, 2000
Uganda Law Reform Commission Act, Cap 25, 2000
Witchcraft Act Cap, 124, 2000

Subsidiary legislation
Community Service Regulations 2001, SI 55/2001
Local Council Courts' Regulations 2007, SI 51/2007
Supreme Court Rules Directions 1996, SI 13-11/1996
Court of Appeal Rules Directions 1996 SI 13-10/1996

Bills in Parliament
International Criminal Court Bill, (18 of 2006) printed in Uganda Gazette No. 67 Volume XCVIX dated 17th November 2006

Tieng Adhola, Jo-Gem and Morwa Guma clan documents
1. The Constitution of Tieng Adhola (2006)
2. Constitution of the Morwa Guma Clan (revised Edition of August 1985)
3. Namwaya Saza clan members register: August 2006.
4. Jo-Gem clan member register: August 2006.
5. Morwa Guma clan court decisions:
Re Auma and Apio, Decision of 18/12/ 2005 (Gombolola Morwa Guma court)
Re J. Okoth and Y. Okoth, Decision of 28/01/2006 (Gombolola Morwa Guma court)
Re O. Odoi and L. Okongo, Decision of 24/02/2002 (Ssaza Morwa Guma Court)

TABLE OF SELECTED CASES

1. Uganda's Court cases

Attorney General v Salvatorio Abuki Constitutional Appeal No.1 of 1998 (S. Court)
Attorney General v Sarah Kigula and 416 others, Constitutional Appeal No.3 of 2006
Agaba Job v Uganda, Criminal Appeal 230 of 2003 (Court of Appeal)
Asenwa Festo and David Kakooza v Uganda, Criminal Appeal 1 of 1998 (S. C)
Bruno L. Kiwuwa v Ivan Serunkuma & Juliet Namazzi High Ct Civil Suit 52 of 2006
Kakooza Livingstone v Uganda, Criminal Appeal 17 of 1993 (Supreme Court)
Kifamunte Henry v Uganda, Criminal Appeal No.1 of 1987 (Supreme Court)
Sarah Kigula and 416 others v Attorney General, Constitutional Petition No.6/2003
Kyamanywa Simon v Uganda, Criminal Appeal No.16 of 1999 (Supreme Court)
Kyamanywa Simon v Uganda, Constitutional Reference No. 10 of 2000
Meri Moses v Uganda, Criminal Appeal No.59 of 2004 (Court of Appeal)
Obua Dennis alias *Amoki Milton v Uganda*, Cr. Appeal 36 of 2001 (Court of Appeal)
Oryem Richard and anor v Uganda Criminal Appeal No.2 of 2002 (Supreme Court)
Pandya v Republic, East Africa Law Reports [1957] 200
Tifu Lukwago v S. Kizza and another, Civil Appeal No. 13 of 1996 (Supreme Court)
Tinyefunza David v Attorney General of Uganda, Constitutional Petition No.1/1997
Uganda v Commissioner for Prisons Ex Parte Matovu [1966] EALR 514
Uganda v Obua Dennis alias *Amoki Milton* High Court Cr Session No. 30 of 2001
Yunus Wanaba v Uganda [2001-2005] HCB 25

2. South Africa

S v T. Makwanyane and M Mchunu [1995] 3 SA 391, (CCT3/94) of 6th June 1995

3. The ICJ

South West Africa Case, Advisory Opinion, 1950 ICJ, (11 July)

4. The Human Rights Committee

Michael and Brian Hill v Spain, Communication 526/1993 (2 April 1997)
Morael v France, Communication 207/1986, (28 July 1989)
Robinson v Jamaica, Communication No. 223/1987, (30 March 1989)
Wolf v Panama, Communication No. 289/1988, 2(6 March 1992)

5. International Criminal Court

The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen ICC-02/04-01/05 *Decision On The Admissibility Of The Case Under Article 19(1) of the Statute* of 10 March 2009
Situation in the Democratic Republic of Congo ICC-01/04-101-tEN-Corr *Decision on the Applications for participation in the proceedings of VPRS1-VPRS6 of* 17 January 2006
Situation in Uganda ICC-02/04-101 *Decision on Victims' applications for participation a/0010/06, a0064/06 to a/0070/06, a/0081/06 to a/0104/06 and*

a/0111/06 to a/0127/06 of 10 August 2007
Prosecutor v T. Lubanga Dyilo ICC-01/04-01/06-1432 *Appeals of the Prosecutor and the Defence against Trial Chamber 1's decision on Victims' Participation* of 18th January 2008
Prosecutor v T. Lubanga Dyilo ICC-01/04-01/06 OA 11 *Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber 1 of 18 January 2008*

6. International Criminal Tribunal for Former Yugoslavia

Prosecutor v Zlato Aleksovski (IT-95-14/1-AR73) Decision on Prosecutor's Appeal on Admissibility of Evidence, 16th February 1999
Prosecutor v. Zlato Aleksovksi (IT-95-14-I-A) Judgement of 24th March 2000
Prosecutor v Babic (IT-03-72-S) Sentencing Judgement 29th June 2004
Prosecutor v Babic (IT-03-72-A) Appeals Chamber, Judgement of 18th July 2005
Prosecutor v Deronjic (IT-02-61-S) Separate Opinion of Judge Mumba, 30th March 2004
Prosecutor v Erdemovic (IT-96-22-T) Sentencing Judgment of 29 Nov. 1996
Prosecutor v Kordic and Cerkez (IT 95-14/2-A) Judgement of 17th December 2004
Prosecutor v Krstic (IT-98-33-A) Judgement of 19th April 2004
Prosecutor v Nikolic, (IT-02-2-60/I-S) (TC), Sentencing Judgment 2 December 2003
Prosecutor v Todorovic (No IT-95-99/1-S) Sentencing Judgement 31 July 2001
Tadic v Prosecutor (IT -94-1-A) Judgment of 15th July 1999

7. International Criminal Tribunal for Rwanda

Prosecutor v Jean Paul Akayesu (ICTR-96-4-A) Judgement of 1st June 2001
Jean-Bosco Baryagwiza v Prosecutor, 'Decision' Case (ICTR-97-19-AR72) 3rd November 1999
Jean Kambanda v Prosecutor, ICTR-97-23-A Appeal Judgment of 19th October 2000
Alfred Musema v Prosecutor (ICTR-96-13-A) Judgement of 27th January 2000
Laurent Semanza v Prosecutor (ICTR-97-20-A) Appeals Decision, 31st May 2000
Prosecutor v. Paul Bisengimana (ICTR-00-60-T) Judgement of 13th April 2006
Prosecutor v Sammuel Imanishimwe (ICTR-99-46-T) Judgement of 25th Feb. 2004
Prosecutor v Jean Kambanda (ICTR-97-23-S) Judgement of 4th September 1998
Prosecutor v Jean de Dieu Kamuhanda ICTR-99-54A-T Judgment of 22nd January 2004
Prosecutor v C. Kayishema and *Obed Ruzindana* (ICTR-95-I-T) Judgment of 2nd May 1999
Prosecutor v *C. Kayishema and O. Ruzindana* (No ICTR-95-1-A) Judgement of 1st June 2001
*Prosecutor v Mikaeli Muhimana (*ICTR-95-1B-T) Judgement of 28th April 2005
Prosecutor v Emmanuel Ndindabahizi (ICTR-2001-71-I) Judgement of 15th July 2004
Prosecutor v Elizaphan and Gérard Ntakirutimana (ICTR-96-10& ICTR-96-17-T) Judgement of 21st February 2003
Prosecutor v Eliézer Niyitegeka (ICTR-96-14-T) Judgement of 16th May 2003
Prosecutor v Joseph Nzabirinda (ICTR-2001-77-T) Judgement of 23rd February 2007
Prosecutor v Georges Ruggiu (ICTR-97-32-I) Judgement of 1st June 2000
Prosecutor v Georges Anderson Nderubumwe Rutaganda (ICTR-96-3-T) Judgment of 6 December 1999

Prosecutor v Vincent Rutaganira (ICTR-95-IC-T) Judgement of 14th March 2005
Prosecutor v Laurent Semanza (ICTR-97-20-T) Judgement of 15th May 2003
Prosecutor v Joseph Serugendo (ICTR-2005-84-I) Judgment of 12th June 2006
Prosecutor v Omar Serushago (ICTR-98-39-S) Judgement of 5th February 1999

8. Special Court for Sierra Leone

Prosecutor v Moinina Fofana and Allieu Kondewa (SCSL-04-14-T) Judgement of 2nd August 2007
Prosecutor v Moinina Fofana and Allieu Kondewa (SCSL-04-14-T) Sentencing Judgement of 9 October 2007
Prosecutor v Moinina Fofana and Allieu Kondewa, (SCSL-04-14-A) Appeal Judgment of 28th May 2008
Prosecutor v Alex Tamba Brima; Brima Bazzy Kamara and Santigie Borbor Kanu, (SCSL-2004-16-T) Judgement of 20th June 2007
Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, (SCSL-2004-16-T) Sentencing judgment of 19th July 2007
Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (SCSL-2004-16-A) Appeal judgment of 22 February 2008
Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao, (SCSL-2004-15-T) Judgement of 25 February 2009

9. Regional Human Rights Bodies

i) African Commission of Human and Peoples Rights

Avocats sans Frontieres (on behalf of Gaetan Bwampamye) v Burundi, Communication 231/99 (2000)
Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria, Communications 140/94, 141/94 and 145/95 (1999)
Dawda Jawara v The Gambia, Communication 147/95 and 149/96 (2000)
Free Legal Assistance Group v Zaire, Communication 25/89, 47/90, 56/91, 100/93 (1995)
Interrights et al (on behalf of Mariette Sonjaleen Bosch) v Botswana, Communication 240/2001 (2004)
Interights, Institute for Human Rights and Development in Africa, and Association Mauritanienne des Droits de l'Homme v Islamic Republic of Mauritania, Communication 242/2001 (2003)
Krischna Achutan (on behalf of Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi, Communication 64/92, 68/92, and 78/92 (1995)
Legal Resources Foundation v Zambia, Communication 211/98 (2001)
Liesbeth Zegveld and Mussie Ephrem v Eritrea, Communication 250/2002 (2003)
Malawi African Association and Others v Mauritania, Communication 54/91, 61/91, 98/93, 164/97 and 210/98 (2000)
Media Rights Agenda and Constitutional Rights Project v Nigeria, Communication 105/93,128/94, 130/94 and 152/96 (1998)

ii) Inter–American Court for Human Rights

Aloeboetoe et al v Suriname, (1994) Inter. Am. Ct. H. R Judgement of 10th September 1993 (Ser. C) No.15 (Reparations)

Genie Lacayo (1997) Inter-Am. Ct. H.R. (Ser. C) 30 Judgment of January 29, 1997

Mayagna (Sumo) Awas Tingni Community v Nicaragua Inter-Am Ct H R Judgment of August 31, 2001 (Series C) 79 (2001); 10 IHRR 758 (2003)

Moiwana village v Suriname Inter. Amer. Ct. H. R. Judgement of June 15, 2005 (Ser. C) 124 (2005)

'*Other Treaties' Subject to the Consultative Jurisdiction of the Court (Article 64 American Convention)* IACtHR Advisory Opinion: 24 September 1982 OC-1/82, (Ser. A) No.1 (1982)

Plan de Sanchez Massacre (Merits) Inter. Amer. Ct. H. R. Judgment of April 29, 2004 (Ser. C) 105 (2004)

Plan de Sanchez Massacre v Guatemala (Reparations) Inter-Am.Ct H.R. Judgment of November 19 2004 (Ser. C) 116 (2004),

Paniagua Morales et al. v Guatemala, (1998) 37 Inter-Am. Ct. H. R Judgement of March 8, 1998 (Ser. C)

Trujillo Oroza v. Bolivia Inter- Amer Ct H R (2002) (Reparations and Costs) Judgement of 27 February 2002, Ser. C, No. 92

Velasquez-Rodriguez v Honduras, Judgement of July 29, 1988 4 Inter Am-Ct-H-R (Ser. C), No.4 (1988)

Velasquez-Rodriguez v Honduras, (Compensatory Damages), Judgment of 21 July 1989, Series C, No. 7

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CHAPTER ONE: INTRODUCTION

The first question addressed in this thesis is whether the international sentencing framework could accommodate traditional African concepts of procedural justice, to ensure fair, culturally relevant sentencing outcomes. The second question is how this could be achieved. The importance of these questions arises in part from a recent challenge to the International Criminal Court. The challenge is that the court's normative sentencing framework excludes African restorative justice process and communitarian values. The answer to my questions, it is argued, will depend to a large extent on how much international law can borrow from traditional practices to inform itself. The questions will be addressed within the context of Uganda where its practical importance can easily be seen.

Section 1: International Crimes – customary remedies

On the 8th July 2005, the International Criminal Court (ICC) issued arrest warrants for Ugandan rebel leader Joseph Kony and four others, for war crimes and crimes against humanity.[1] This followed a referral by Uganda- the first ever referral by a state to the ICC, on 16th December 2003.[2] To date the warrants have not been enforced, because in a bizarre twist, Kony and his commanders are trying to evade the

[1] ICC-02/04-01/05-53 as amended on 27/09/05 (Joseph Kony); ICC-02/04-01/05-54 (Vincent Otti) killed in 2007 on the orders of Kony; ICC-02/04-01/05-56 (Okot Odhiambo) and ICC-02/04-01/05-57 (Dominic Ongwen). The case against Raska Lukwiya who was killed in 2006 by the Ugandan army was terminated in ICC-02/04-01/05-248. The counts of war crimes and crimes against humanity like murder, rape, sexual enslavement and forced enlistment of children are available at http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200204/visited on 11/03/2009. This 23 year old war, is a continuation of ethnic tensions between the Bantu linguistic group (South) and the Nilotics (North), fuelled by economic imbalance in the northern Acoli sub-region. There is also retaliation by the North for atrocities committed in their region by the government forces (perceived as coming from the South) when they took over political power in 1986. Claims by Joseph Kony that he had magical powers to defeat the government forces fanned the rebellion: K. P Apuuli, 'The International Criminal Court (ICC) and the Lord's Resistance Army (LRA) insurgency in Northern Uganda' (2004) 15 *Criminal Law Forum* 391-409, 392-402 and E. K Baines, 'The Haunting of Alice: Local approaches to Justice and Reconciliation in Northern Uganda' (2007) 1 *International Journal of Transitional Justice,* 91-114, 98-103 give a detailed account of the root of this rebellion.

[2] ICC-02/04-01/05-329-Conf-Anx B. A detailed legal analysis of this referral is undertaken by P. Akhavan, 'The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court' (2005) 99 (2) *American Journal of International Law* 403-421,409-412; K. P Apuuli, 'The ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospects for Northern Uganda' (2006) 4 (1) *Journal of International Criminal Justice,* 179-187, 183-186 and M. Zeidy, 'The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC' (2005) 5 (1) *International Criminal Law Review* 83-119, 90-110.

paradigm of international criminal justice by insisting on trial under Acoli traditional justice in Uganda. In this regard, the Government of Uganda and Kony's Lords' Resistance Army (LRA) rebels signed the 29th June 2007 Agreement on Accountability and Reconciliation (hereafter 'June Agreement'); and it's Annexure of 19th February 2008.[3] Uganda's President, Mr Museveni, later announced a decision arrived at by the government and Acoli leaders, on Kony and his rebel leaders:

> 'What we have agreed with our people is that they should face traditional justice, which is more compensatory than a retributive system.... If that's what the community wants, then why would we insist on a trial in The Hague?'[4]

Despite Mr. Museveni's assurances, Kony refused to sign the final peace agreement because he wants details on how the Acoli traditional justice mechanism would work.[5] Museveni's pledge and Kony's rejection of the June Agreement, portrays the failure of international justice to accommodate traditional justice. The peace talks are now in abeyance.

The June Agreement opts for alternative justice, defined as 'justice mechanisms not currently applied by the formal courts of judicature', including traditional justice process and alternative sentences.[6] The emphasis is on collective and individual acts of reconciliation, victim participation in reconciliation and a range of reparations including symbolic measures.[7]

The procedural guarantees are then set out in Paragraph 3.33 as follows:

> 'With respect to any proceedings under this Agreement, the right of the individual to a fair hearing and due process, as guaranteed by the Constitution, shall at all times be protected.'

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[3] The June Agreement is one step towards the signing of a final peace agreement. Both Agreement and Annexure are reproduced in Appendix 7 and 8.

[4] BBC News: 12/03/08 http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/africa/7291274.stm: visited 12/03/2008. Ironically, it is Mr. Museveni himself who requested the ICC to investigate the LRA rebels. As Drumbl convincingly puts it, this 'hedging' results from a realisation by the government that it has no influence over the ICC intervention: M. A Drumbl, *Atrocity, Punishment and International Law* (Cambridge: Cambridge University Press, 2007) 146. Hedging may also reflect the political influence of Acoli traditional leaders: N. Grono and A. O`Brien, 'Justice in Conflict?: The ICC and Peace Processes' in N. Waddell and P. Clark (eds.), *Courting Conflict? Justice, Peace and the ICC in Africa,* (Royal African Society, March 2008) 14-16. Available at http://www.royalafricansociety.org visited on 16/06/2008.

[5] *New Vision* 10th April 2008. Kony wrote a letter in his language –Luo, saying he would rather die fighting than be taken to Europe and hanged. Kony also rejects trial and hanging in Uganda. The letter is printed in the *Sunday Monitor* 25th May 2008.

[6] June Agreement, *op cit,* definition section and para 5.3. Under para 6.3 (Sentences and Sanctions), legislation will introduce a regime of alternative penalties and sanctions, replacing existing penalties with respect to serious crimes and human rights violations committed by non –state actors during the conflict.

[7] *Ibid,* paras. 5.3, 7 - 9.

Paragraph 3.33 refers to procedural rights under Article 28 of the Ugandan 1995 constitution.[8] The right to legal representation for defendants and victims in formal proceedings is also protected (Paragraphs 3.7-3.8). Notably absent, is any reference to a traditional notion of rights under the alternative justice mechanisms.

Two procedural mechanisms are then defined. The first is based on traditional justice mechanisms described as central to the framework for accountability.[9] Traditional mechanisms encompass what I call a traditional restorative justice model. This model applies traditional criminal laws and processes, aimed at restoring the victim to their previous position and bringing the society into social harmony. Such a model, like the Acoli *Mato Oput*, is advocated for by pressure groups including Acoli clan elders and religious leaders like the outspoken Bishop Baker Ochola. He posits that the model is sufficient in itself because it promotes: 'a model of healing through the culture of non violence, forgiveness, reconciliation and peace.'[10] Bishop Ochola's views are echoed by some Acoli people who urge that the ICC warrants should be withdrawn to allow *Mato Oput* model to be implemented.[11] The Chief Justice agrees: 'As the custodian of the judiciary, I still believe in traditional justice like the *Mato Oput* (…).'[12]

The *Mato Oput* works in the following manner. The perpetrator stands outside the 'Gate of the village' (perpetrator's village), gives his or her particulars, describes the crimes committed and why the perpetrator committed them. The elders take collective responsibility on the perpetrator's behalf. Two sacrificial lambs are slaughtered. The victim community and perpetrator's community exchange half of each lamb, cook and eat the legs after which both communities jointly drink (*mato*) a bitter

[8] The Constitution of Uganda, Cap 1 (Laws of Uganda, revised edition of 2000). Unless otherwise stated, laws referred to in this thesis are of this 2000 edition.

[9] *Ibid*, para.3.1 refers to *Culo Kwor, Mato Oput, Kayo Cuk, Ailuc* and *Tonu ci Koka* traditional mechanisms used in different ethnic communities to compensate and reconcile parties torn by conflict. J. Ogik, *International Justice Systems: Linkages to National and Traditional Justice Systems* a paper presented at the Freiderich Eibert Foundation and Uganda Law Society workshop, Kampala: Hotel Africana, 8th February 2007 3-4 gives a description of these mechanisms.

[10] Bishop B. Ochola, *New Vision* 28th August 2006. Details in Liu Institute for Global Issues, *Roco Wat I Acoli, Restoring Relationships in Acoli-Land: Traditional approaches to Justice and Reintegration* (September 2005) Chapter 5 pages 54-58, available at http://www.ligi.ubc.ca/page121.htm Visited on 28/06/2008.

[11] *New Vision*, 3rd October 2006 quoting some victims who state emphatically that: 'We want no case against the LRA.'

[12] *New Vision*, 17th May 2007.

herb called *Oput* to signify the reconciliation.[13] Reparation includes compensating the victim family with payment of cattle or money. This ritual is part of the traditional sentencing and reconciliation process. The emphasis is on the oral nature of proceedings and public participation, without legal representation.

The second procedural mechanism is based on formal court procedures (Paragraphs 6.1-6.2). Uganda's formal procedures are modelled on the common law adversarial system, premised on judicial control. The judge hears evidence from both sides (prosecution and the defence) then passes both verdict and sentence, while making sure that the defendant's rights are protected throughout the trial.

This overarching justice framework conflates two procedural models (formal courts and traditional justice) that do not speak normatively to each other and in practice, operate as separate justice systems. Yet, they appear to be brought together to circumvent the paradigm of international procedural justice. This is apparent in the Annexure of 19th February 2008 (hereafter 'Annexure') that provides for a War Crimes (Special) Division of the High Court to try persons responsible for war crimes.[14] This Division's legislation may provide for the 'recognition of traditional and community justice processes in proceedings'.[15] Although these processes are not defined, traditional mechanisms therein include 'communal dispute settlement institutions such as family and clan courts'. Participation in rituals is voluntary.[16] Under Paragraph 23, clan courts will have criminal jurisdiction on a par with the High Court War Crimes Division, to handle serious crimes of lower rank LRA rebels. Thus, the Annexure underscores the importance of traditional courts as institutions of social control and re-affirms the centrality of traditional justice in the June Agreement. Conspicuously, the Annexure is silent in terms of sentencing,[17] and the applicability of a traditional notion of rights.

Though the June Agreement is described as an effort to 'meld local demands and international legal obligations,[18] clearly this domestic arrangement cannot supplant

[13] The mystical legend of how the Oput tree settled a dispute between clans by mysteriously uprooting itself and falling between the two warring clans, is regarded as the origin of *Mato Oput* as a reconciliation ritual: S. Abili, *Sunday Monitor* 30th July 2006.

[14] Annexure 2008 *op cit* paras. 7-9. This Division: 'War Crimes Court', has been created under paragraph 2, Administrative Circular 1/2008 by the Principal Judge, dated 23/05/08, effective 1st July 2008. A copy of the circular given to me, courtesy Mr. L. Tweyanze- the Principal Judge's Assistant, is on my file.

[15] Annexure *ibid*, para.9 (e).

[16] *Ibid*, para.21 (ii)- para 22.

[17] M. Otim and M. Wierda, 'Justice at Juba: International Obligations and Local Demands in Northern Uganda' in N. Waddell and P. Clark (eds.), *Courting Conflict op cit* 25.

[18] *Ibid*, 21. While both parties have declared their commitment to honour Uganda's international obligations as a party to the Rome Statute of the ICC, the Agreement is also driven by the perceived need

international criminal justice. Indeed, both the Agreement and Annexure are criticised for attempting to use traditional justice to replace the criminal justice process.[19] Even so, they challenge the legitimacy of international criminal law in adjudicating crimes both at an international and national level.

The ICC on its part will not countenance alternative trial frameworks and insists that the indicted rebels will face a fair trial before it.[20] Recently, Pre-Trial Chamber II held that the case against Kony and his rebel commanders is still admissible under Article 17 of the Rome Statute of the International Criminal Court (hereafter 'Rome Statute') therefore the ICC could hear it.[21] Under Article 17, the Rome Statute is complementary to national law and is applicable only where the state has failed to prosecute its offenders. Paradoxically, as the Pre Trial Chamber observed, Uganda government gave conflicting information: on the one hand that it will try offenders before its Special Division, and on the other hand that it will not supplant the jurisdiction of the ICC.[22] This paradox emerges because Article 17 has inadvertently caused states to attempt to homogenise domestic laws, by 'massaging the traditional into the neo traditional' to prevent the ICC from trying the case.[23] Uganda's proposed conflation of systems under the June Agreement and Annexure are a case in point.

Two problems arise from this proposed merger of systems that mirror the weakness in the established international sentencing framework. The first problem is the belief in mysticism as an element of crime, mitigating factor and part of traditional sentencing process: a peculiar feature of this LRA case. The *Mato Oput* model is now used as a euphemism for purification and reconciliation, but its application in a war situation has roots in the supernatural. Traditionally performed in the village by clan elders only, it is now done in the towns and camps.[24] Traditionalists regard this modern

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to use traditional criminal processes of accountability to bring an end to the war and promote reconciliation: Agreement *op cit* Preamble paragraphs 3-4.

[19] Amnesty International, 'Uganda: Agreement and Annex on Accountability and Reconciliation Falls Short Of a Comprehensive Plan to End Impunity' (March 2008) AI Index: AF 59/001/2008 para.4 page 19-20 at http://www.reliefweb.int/rw/RWB.NSF/db900SID/LRON-7CTEZN?OpenDocument Visited on 16/06/2008.

[20] Ms. S. Arbia, Registrar of the ICC in an interview with the *Daily Monitor*, 30th May 2008, 3rd June 2008. She maintained that the warrants must be enforced since Uganda is a party to the Rome Statute.

[21] *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* ICC-02/04-01/05 *Decision On The Admissibility Of The Case Under Article 19(1) of the Statute* of 10 March 2009.

[22] *Ibid*, para 45. Pre-Trial Chamber II found that the June Agreement and Annexure were not evidence of the state's ability to prosecute under Article 17 since both lacked the force of law: paras. 49-52.

[23] M. Drumbl *op cit* at 145 citing E. Blumenson and J R Quinn.

[24] T. Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London, New York: Zed Books, 2006) 132-136.

form of *Mato Oput* as deficient because it does not remove the *cen* (ill luck) and does not involve the use of *ajwaki* (spirit mediums) to remove the spirits:

> 'We need to perform ceremonies to deal with the spirit. … Kony may agree to talk but you have to find the spirit … If they arrest Kony, the spirit will just continue. It is the spirit that has forced Kony to do things'.[25]

Indeed Kony himself asserts that he is guided by spirits who talk to him, direct his actions and help him foretell events.[26] This aspect of mysticism is a controversial point of departure in sentencing. Mysticism is unacceptable in a legal setting founded on Judeo-Christian beliefs. Equally, from a traditional perspective, courts of law lack the 'jurisdiction' to remove 'spirits'. This 'inability' of courts of law to remove ill luck: *cen*, as part of the sentencing process, shows how the proposal for an overarching justice framework in the June Agreement oversimplifies the problem. Therefore, there is need for careful re-consideration of the impact of spiritualism on international criminal proceedings.

The second problem is that the June Agreement highlights normative impediments to the successful importation into a domestic context, of international procedural regimes. Akhvan cautions that the functional importance of the ICC in trying the top LRA leaders under international criminal justice, should not eclipse the equally important traditional restorative justice process.[27] As Stahn argues, these international procedural regimes may fail to gain acceptance at the domestic level if they are incompatible with the legal culture of that society. He cautions that institutional frameworks operating in one country cannot simply be transposed on a different society without adjustment.[28] Such incompatibility is assured for as long as any adoption by international procedural justice of traditional customary procedures fails to deal with issues like mysticism, rituals and the traditional notion of participatory justice as part of the sentencing process.

However, as I demonstrate in this thesis, the patchwork of procedural systems embodied in the June Agreement cannot be used as a long term solution for achieving

[25] *Ibid*, 152-156 quoting Esther Aluk. Spiritualism has also proved to be a thorny issue to religious leaders and some Christians who are outright opposed to *Mato Oput* on grounds that it involves satanic practices. They press for the adoption of an adapted version of it 'minus the spiritual/ritualistic overtones': J. Ogik, *Daily Monitor* 24th October 2006.

[26] Kony affirms this in his interview with Sam Farmer of the BBC: *New Vision* 28th June 2006.

[27] P. Akhvan *op cit* 421.

[28] C. Stahn, 'Between Harmonization and Fragmentation: New Groundwork on Ad Hoc Criminal Courts and Tribunals' (2006) 19 (2) *Leiden Journal of International Law* 567-577, 576-577.

procedural justice. This is because Uganda's procedural framework does not have sufficient procedural guarantees for all parties during sentencing hearings. Customary laws are likewise deficient in this area. Also as M. Senyonjo contends, *Mato Oput* is not an alternative to the ICC because it does not afford due process rights to the accused: like the right to legal representation, or to be given information about the allegations against them.[29] These issues must be taken into account while considering the two questions set out at the start of this thesis.

This chapter provides a backdrop against which the question on achieving procedural justice in the African context is answered. Following this introduction, I delineate the problem of accommodating traditional justice in international sentencing proceedings (Section 2). I then set out my argument (Section 3). Next is a definition of central concepts in the thesis (Section 4). I outline Uganda's historical, political and legal background in Section 5, followed by a précis of the methodological approaches (Section 6). Lastly is the layout of the thesis (Section 7).

Section 2: Human rights, traditional justice and international sentencing proceedings

Human rights protection is central to the question of accommodating traditional restorative justice in international criminal proceedings. This section sketches the conjoined origins of human rights and international procedural models particularly, the emphasis on protection of individual rights. The result is the exclusion of any direct reference to a traditional notion of rights and traditional restorative process.

(i) Human rights origins and international criminal tribunals

For much of its history, international criminal law has been rudimentary and indeterminate.[30] Such unsystematic growth hinders the development of sentencing practice that takes into account indigenous local criminal processes and a traditional notion of human rights within international procedural law.

[29] M. Senyonjo, 'The International Criminal Court and the Lord's Resistance Army leaders: Prosecution or Amnesty?' (2007) LIV *Netherlands International Law Review*: 51-80, 64-65.

[30] L. Sunga, *The Emerging System of International Criminal Law* (The Hague: Kluwer, 1997) 2-8 and Chapter VI. G. K McDonald and O. S Goldman, *Substantive and Procedural Aspects of International Criminal Law: the Experience of International and National Courts*, Vol. I and II, (Cambridge, MA: Kluwer, 2000).

Human rights evolved from due process origins in the English Magna Carta of 1215, where no free man would be imprisoned or deprived of liberty 'except by legal judgement of his peers and by the law of the land'.[31] Due process was crystallised during the Enlightenment, when rules were created to limit the power the state could have over the liberty and security of the person.[32] One of the distinctive features of these rules was the respect for the defendant's rights.[33] Protection of the defendant's rights filtered through western societies till the world wars. After the 2nd World War, the establishment of the International Military Tribunals at Nuremberg and Tokyo marked the real beginning of international criminal trials and justice.[34]

The atrocities of the Nazi regime partly led to the development of the United Nations (UN) Charter in 1945 and the Universal Declaration of Human Rights (UDHR) in 1948.[35] The UDHR marked the emergence of the international status of human rights. It contained two parts: the first being protection of individual civil and political rights and the second being economic, social and cultural rights. These parts were concretised into two covenants: The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) respectively.[36] Subsequently, a strong victim-centred movement evolved: one that wanted states to bring alleged perpetrators of atrocities to face justice.[37] The idea of an international criminal court then grew from a provision in the 1948 Genocide Convention.[38] Article 6 thereof was adopted by the UN General

[31] S. Zappala, *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2003) at 3 citing Chapter 39 of the Magna Carta.

[32] C. Safferling, *Towards an International Criminal Procedure* (Oxford: Oxford University Press, 2001) 21. A comprehensive appraisal of this phase of the human rights evolution is in S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (New York, Cambridge University Press, 2006) 2-7.

[33] F. Tulkens, 'Criminal Procedure: Main Comparable Features of the National Systems' in M. Delmas-Marty (eds.), *The Criminal Process and Human Rights: Towards a European Consciousness*, (Dordrecht: Martinus Nijhoff Publishers, 1995) 7.

[34] D. McGoldrick, 'Criminal Trials before International Tribunals: Legality and Legitimacy' in D. McGoldrick, P. Rowe and E. Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford and Portland, Oregon: Hart Publishing, 2004). The Allies, (United States of America, Britain and the former Union of Soviet Socialist Republics) who set up the Tribunals, derived their legitimacy as de facto rulers of the territory they took over, and exercised jurisdiction ostensibly on behalf of the international community as universal jurisdiction: 14-20.

[35] *Ibid*, 19. D. Weissbrodt and M. Hallendorff, 'Travaux Preparatoires of the Fair Trial Provisions-Articles 8 to 11-of the Universal Declaration of Human Rights' (1999) 21 *Human Rights Quarterly* 1061-1096, 1069-1083 for a comprehensive analysis of the travaux preparatoires of the UDHR.

[36] ICCPR (1976) adopted by General Assembly resolution 2200A (XXI) of 16 December 1966. ICESCR (1976) adopted by General Assembly resolution 2200A (XXI) of 16 December 1966.

[37] W. A Schabas, 'International Justice For International Crimes: An Idea Whose Time Has Come,' (2006) 14 (4) *European Review* 421-439, 422.

[38] Convention for the Prevention and Punishment of the Crime of Genocide (1951) 78 UNTS 277.

Assembly in recognition of the fact that genocide was a crime under international law and persons could be tried by an international penal tribunal. Towards the end of the 1980s, the UN General Assembly passed Resolution 44/89, directing the International Law Commission (ILC) to prepare a report on the creation of an international criminal court.

In the mid 1990s, war broke out in the Balkans and in February 1993, the UN Security Council adopted a draft statute prepared by the Secretary General to set up an International Tribunal in former Yugoslavia (ICTY).[39] The ICTY Statute and ICTY Rules of Procedure and Evidence (RPE) concretised Article 14 ICCPR, but with little emphasis on victims' rights. The following year there was genocide in Rwanda and the Security Council adopted a draft statute setting up an ad hoc International Tribunal for Rwanda (ICTR).[40] The text of the ICTR Statute and RPE were substantially the same as that for the ICTY. In effect, Article 14 ICCPR rights were applied wholesale. Rwanda then passed the Organic laws setting up Gacaca jurisdiction: a model based on international and traditional procedures but without the bulwark of Article 14 ICCPR safeguards like the right to legal representation.[41] The Organic laws have received sustained international criticism.[42]

In 1994, the ILC adopted its Draft Statute for an International Criminal Court.[43] The UN General Assembly gave the task of examining the ILC draft Statute to a Preparatory Committee (Prep Com) whose membership was open to all member states of the UN and specialised agencies. The Prep Com completed its task, reporting in April 1998.[44] The Rome Statute was subsequently adopted by the Rome Conference[45] with some major modifications that include an expanded scope of Article 14 ICCPR,

[39] Statute of the ICTY: UN Doc. IT/32 Rev. 39 (1994) is annexed to the Security Council Resolution 827/1993. See also *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)* presented 3 May 1993 (S/25704) setting out the legal basis, competence and organisation of the Tribunal. L. Sunga *op cit* 284-290.

[40] Statute of the ICTR: UN Doc. IT/32/Rev.1 (1995) is annexed to the Security Council Resolution (S.C. Res) 955/ 1994. L. Sunga *ibid* 290-297.

[41] K. P Apuuli, *Procedural Due Process Safeguards in the Prosecution of Genocide Suspects: The Case for the International Criminal Tribunal for Rwanda (ICTR), National Genocide Trials and the Gacaca Courts in Rwanda* unpublished D. Phil Thesis (University of Sussex, 2006) 183-186.

[42] A comprehensive summary of these critiques is in A. Meyerstein, 'Between Law and Culture: Rwanda's Gacaca and Postcolonial Legality' (2007) 32 (2) *Law and Social Inquiry* 467-508, 478-480.

[43] *Report Of The International Law Commission On The Work Of Its Forty-Sixth Session*, 2 May-22 July 1994 GOAR forty-ninth session, supplement 10 (A/49/10). *The Draft Statute for an International Criminal Court with commentaries* (1994) is available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7_4_1994.pdf. Visited on 16/02/2009.

[44] *Report of the Preparatory Committee on the Establishment of an International Criminal Court*: U.N. Doc.A/CONF.183/2Add.1 April 14, 1988.

[45] The Rome Statute of the International Criminal Court A/CONF.183/9 of 17 July 1998.

and more participation for victims during trials. The ICC is now investigating situations, issuing arrest warrants, and some trials have begun.[46]

Previously, another UN war crimes tribunal was established in 2002 in Sierra Leone. By an agreement, a treaty was entered between the United Nations and the government, setting up the Special Court for Sierra Leone (SCSL).[47] This hybrid international-national model is based largely on the ICTR procedural framework and rights protected therein. This court was the first of its kind and others have followed since, including Cambodia,[48] East Timor,[49] Kosovo,[50] Lebanon[51] and Iraq tribunals.[52] This thesis only focuses on the SCSL and the ICTR. It does not investigate the other tribunals because the context in which they operate does not relate directly to African customary law in action.[53]

This brief history shows that in respect to the African crises in Rwanda and Sierra Leone, the international procedural models were transplanted with no direct reference to traditional customary practices or values. This criticism could also be levied at the ICC. This has direct implications for the protection of human rights. I develop this argument further in sub section (ii) below.

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[46] The trials include ICC-01/04-01/06, *Case The Prosecutor v. Thomas Lubanga Dyilo* of Democratic Republic of Congo; and ICC-01/05 -01/08 *Case The Prosecutor v. Jean-Pierre Bemba Gombo* of Central African Republic. Other cases before the court are: ICC-01/04-02/06, *Case The Prosecutor v. Bosco Ntaganda*, ICC-01/04-01/07, *Case The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* of Congo. A situation under investigation in Darfur is ICC-02/05-01/07 *Case The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*. The court has issued an arrest warrant for President Bashir of Sudan for atrocities committed in Darfur: ICC-02/05-01/09 *In The Case Of The Prosecutor V. Omar Hassan Ahmad Al Bashir*. Source: http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases visited on 10/03/2009.

[47] Statute of the Special Court for Sierra Leone, pursuant to Security Council Resolution 1315(2000) of 14/08/2000.

[48] Extraordinary Chambers in the Courts of Cambodia Set up by the UN and Government of Cambodia. General Assembly Resolution 57/288 of 18th December 2002.

[49] Serious Crimes Panels in the District Court in East Timor established by the Security Council by SC Res. 1272 (1999). The courts are set up under Regulation 2000/11.

[50] Regulation 64 Panels in the courts of Kosovo established by the UN Mission in Kosovo under Regulation 2000/64 of 15/12/2000.

[51] Special Tribunal for Lebanon set up under Security Council Resolution 1757/2007 to try persons responsible for the attack on 14th February 2005 that killed former Lebanese Prime Minister Rafiq Hariri.

[52] Supreme Iraqi Criminal Tribunal was originally set up under Article 48 of the Transitional Authority Law. However in mid-2005, a new statute was promulgated as Law 10 of 2005 on 18th October 2005.

[53] References may be made only in as far as is relevant. Merits and demerits of these hybrid courts are analysed, for example, by S. M. H Nouwen, 'Hybrid courts: The Hybrid Category Of A New Type Of International crimes courts' (2006) 2 (2)*Utrecht Law Review* 190-214; L. Dickinson, 'The Promise of Hybrid Courts' (2003) 97 (2) *American Journal of International Law* 295-309 and W. Burke-White, 'A Community of Courts: Towards a System of International Criminal Law Enforcement' (2002) 24 (1) *Michigan Journal of International Law*, 1-101.

(ii) The right to a fair trial in international law: Article 14 ICCPR

International criminal procedure is premised only on protection of individual accused's rights. Individual rights are set out in Article 10 of the UDHR where everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of any criminal charge. This article enshrines the doctrine of due process that ensures procedural fairness. Article 14 ICCPR protects the right to a fair trial and also guarantees in full equality for the accused, due process rights to the use of language of choice; facilities for preparation of the defence; trial without delay; legal representation of choice; the right to give and confront evidence; assistance of an interpreter and protection against self incrimination.[54]

The right to a fair trial has been replicated in Statutes of international criminal tribunals like the ICTR, ICTY and SCSL and their RPE.[55] Also the Rome Statute guarantees a broader range of rights for the accused in Article 67 than Article 14 ICCPR like the entitlement to raise defences and present other admissible evidence.[56] The ICC model is based in part, on protection of individual victim's rights. In this regard, Article 68 provides for protection of victims including special measures for victims' participation in proceedings.

Regional instruments and domestic legislation have also borrowed extensively from the UDHR and ICCPR. To illustrate: Article 14 ICCPR is protected by the European Convention on Human Rights (ECHR) (1950);[57] the American Convention

[54] ICCPR *op cit*: Article 14 (3) (a-g). Others rights include equality before the law, presumption of innocence and the right to judicial review - clauses 1, 2 and 5.

[55] For instance, Article 21 ICTY Statute, Article 20 ICTR Statute *op cit* and Article 17 SCSL Statute protect the right to a fair trial. Also ICTR RPE UN Doc.IT/29(1994) protects the right to a public hearing: Rules 78; the right to give and confront evidence: Rule 85(A)-(C) and the right to be protected against self incriminating evidence: Rule 90 (E).

[56] Article 67(1e) Rome Statute *op cit*. For instance, the Appeals Chamber affirmed the Trial Chamber's oral decision that the accused is entitled to full disclosure from the prosecution, is under no pressure to testify or raise defences early as a condition of obtaining prosecution disclosure and is entitled to rely upon the right to remain silent in Article 67 (1) (g) in *Prosecutor v T. Lubanga Dyilo* ICC-01/04-01/06 OA 11 *Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber 1* of 18 January 2008: para 55. Other 'broad' provisions include the right to remain silent, which silence shall not be construed as a consideration of guilt or innocence (1g); the right to make an unsworn oral or written statement in one's defence (1h) and the right not to have imposed any reversal of burden of proof or onus of rebuttal (1i). Article 67 largely adopts Article 14 (1) (3) ICCPR.

[57] ECHR (4th Nov. 1950) (ETS No.5) 213 U.N.T.S. 222 entered into force 3rd September 1953: Article 6 (3) (a-e); as amended by Protocols 3, 5, 8, and 11 entered into force on 21/09/70; 20/12/71; 1/01/90 and 1/11/98.

on Human Rights (1969);[58] the Arab Charter on Human Rights (2004)[59] and Article 7 of the African Charter on Human and People's Rights (1981) (hereafter the 'African Charter').[60] The African Charter is developed by the *Principles and Guidelines on the right to a Fair Trial and Legal Assistance in Africa* (2003), under which the right to a fair trial applies to both national and traditional courts. Notably absent, is a definition of a traditional communitarian notion of 'rights' both in the African Charter and decisions of the African Commission on Human and Peoples' Rights.

Domestic legislation like the 1995 Ugandan constitution, incorporate most of Article 14 (1) ICCPR and Article 10 UDHR. The Bill of Rights in Article 28 protects the right to a fair trial for the accused. This right may not be derogated from under Article 44. There are no provisions on protection of victims or witnesses.[61] Further, the Supreme Court in *Attorney General v Sarah Kigula and 416 others* in 2009, held that offenders have a right to be heard during sentencing, even where a mandatory sentence is passed.[62] Uganda being a state party to the Rome Statute[63] has given effect to it by passing the International Criminal Courts Bill, 2006 (ICC Bill).[64] The ICC Bill enables the ICC to conduct trials in Uganda. Ugandan courts of law may also try international crimes under the Rome Statute and enforce penalties and orders of the ICC.[65] While it is true that the ICC Bill makes no explicit reference to rights for the accused and protection of victims and witnesses during the trial, these rights are arguably covered under the 'functions and powers' of the ICC sitting in Uganda (Clause 92 (1) ICC Bill). In this case, the Uganda constitution would apply.[66] Conspicuously absent, is any reference in either the ICC Bill or Uganda's constitution to a traditional notion of procedural rights.

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[58] Also known as the Pact of San José (1969) entered into force 18th July 1978, O.A.S. Treaty Series No. 36: Article 8 (2) (a)-(h).

[59] Article 7- Arab Charter on Human Rights adopted 22nd May 2004, entered into force on 15/03/08.

[60] It is also known as the Banjul Charter because its final draft was made in Banjul, The Gambia.

[61] D. D. N. Nsereko, 'Uganda' in R. Blanpain (ed.) *International Encyclopaedia of Laws* (London: Kluwer Law International, 1995) on rights of the accused during trial: 302-309.

[62] *Attorney General v Sarah Kigula and 416 others*, Sup. Court Constitutional Appeal No. 3 of 2006, Judgement of 21st January 2009.

[63] Uganda signed the Rome Statute on 17th March 1999 and ratified it on the 14th June 2002: www.mindfully.org/WTO/2003/Rome-Statute-ICC-Ratifications7jun03.htm. Visited on 24/04/2008.

[64] International Criminal Court Bill No. 18 of 2006 Uganda Gazette No. 67 Volume XCVIX of 17/11/06.

[65] *Ibid*, Objects of the ICC Bill in the Memorandum, Paragraph (g) (h) and (i). For a commentary on efforts by African states to adapt legislation in cooperation with the ICC, see O. Bekou and S. Shah, 'Realising the Potential of the International Criminal Court: The African Experience' (2006) 6 (3) *Human Rights Law Review* 499-544.

[66] Clause 30 of the Bill *ibid*, provides only for the rights of arrested persons. Clause 58 only affirms victim's physical protection under Article 93 (1) (j) of the Rome Statute. This is not in the context of Articles 67 or 68 of the Rome Statute.

Despite this entrenchment of Article 14 ICCPR in the Rome Statute (and at the national level) the following observation can be made. The apparent consensus in the Rome Statute on the application of international human rights norms masks a complicated reality. Uganda like other African countries is culturally diverse. It is a country in which the traditional customary practices of the majority were abolished by legislation and has for a long time applied procedural laws founded on English common law. In reality, local communities operate a de facto traditional justice system as the Kony saga illustrates. Thus, the international and traditional systems remain divergent at a theoretical level due to two competing interests. At the procedural level, the sentencing model in Article 76 Rome Statute based on judicial control, differs from the traditional participatory restorative process. At the doctrinal level, the notions of autonomy and equality inherent in Article 14 ICCPR, conflict with rights of a communitarian nature that govern trials under traditional restorative justice.[67]

Clearly then, reconciling the international and traditional models are important to the way in which international sentencing hearings are taken and received by the local communities. This is more so because international criminal law, though applied *only* where national jurisdictions cannot guarantee adequate prosecution [and sentencing] of crimes under international law (Article 17 Rome Statute); remains distant from traditional restorative and re-integrative methodologies. The Preamble to the Rome Statute, paradoxically, resolves to guarantee *lasting respect* for and the enforcement of international justice.'[68] I hypothesize that achieving this respect entails a concern about the local legitimacy of international sentencing procedures. I develop this argument further in the next section.

Section 3: Achieving local procedural legitimacy for international sentencing

This section sets out my main argument. It may be helpful to begin by stating explicitly where the frontiers of my concerns are to be found. This work is located in international procedural justice and traditional restorative justice. This thesis is not a narrative concerning issues of transitional justice in Uganda as reflected specifically in

[67] Autonomy refers here to the Kantian reasoning that an individual is an independent moral agent free to think rationally; make well reasoned choices and no person should be used solely as a means to an end. Equality refers to individual's equal opportunities to participation of a system: A. Gerwith, *Human Rights: Essays on Justification and Applications* (Chicago: University of Chicago Press, 1982) 5, 27-30, 61-63, 283.

[68] Rome Statute *op cit*, Preamble paragraph 4. Emphasis is mine.

the impending LRA trial. Nor does it engage in a theoretical debate on values, rules and principles of international procedural law or restorative justice. This thesis does not engage with sociological or legal anthropological literature on the relationships between types of society and types of justice. Also, it does not go into too much detail on punishment and substantive human rights law on sentences. This is because to achieve fair sentencing outcomes, what is important is the process leading up to sentence and the implications of that process for human rights protection. In particular, I am interested in whether notions of traditional restorative justice could be accommodated in international notions of procedural justice in order to achieve a more legitimate sentencing process. I look for inspiration to the customary procedures of the Ugandan clan courts.

The main problem in assessing the merits of these customary procedures is the paucity of evidence to confirm or discount the claims of its critics or proponents. Since international criminal law excludes the application of customary African law, there is a dearth of evidence on how the international sentencing framework might work in practice, if combined with legitimate aspects of traditional restorative justice. My view is that this theoretical reconciliation cannot take place in the absence of empirical evidence. Moreover, the Kony saga with its search for a quick transitional justice solution has overshadowed the need to get evidence on how traditional restorative justice transformations could work.

There is anecdotal evidence of cases handled by clan court criminal jurisdiction in Uganda. Although academic works refer to their sentencing jurisdiction as being mainly compensatory, there is little data to back up this assertion.[69] A national empirical study: the Criminal Justice Baseline Survey was carried out in 2002 by the government's Justice, Law and Order Sector (JLOS). The survey established that public confidence in national law courts was waning and people resorted to kinship systems, including clan courts, to get atonement for victims through compensation. The survey concluded, however, that 'in less formal ways of dealing with criminal cases including clan, lineage or family elders, resort to kinship structures is no longer frequent'.[70] This conclusion was arrived at without citing supporting evidence. The survey further

[69] See D. D. N Nsereko, 'Victims of Crime and Their Rights' in T. Mwene-Mushanga (ed.) *Criminology in Africa* (Kampala: Fountain Publishers, 2002) discussed in section 5 *infra*. Even older African studies like T. O Elias, *The Nature of Customary Law* (Manchester: Manchester University Press, 1956) have no figures but only a descriptive account of the sentencing process.

[70] Justice, Law and Order Sector, *Criminal Justice Baseline Survey* (Kampala: JLOS, 2002) para 14.2.2, at 83, emphasis added.

asserted that probably 50% of crimes go unrecorded as people handle cases informally,[71] although it gave no details on whether cases handled by clan courts are included within this 50%.

A more relevant investigation is the Uganda Law Reform Commission's (ULRC) 2003 study on sentencing reform. The study established that participants regarded sentencing procedures of the clan courts to be more informal, accessible and conciliatory than those of the national courts. The ULRC report concluded that the sentencing procedures in the national courts are 'alien to most respondents'.[72] Two clear points emerge from the JLOS survey and ULRC study. First, that clan courts are prominent and handle a sizeable portion of the criminal cases. Secondly, that the processes by which criminal cases are heard in national courts, lack a restorative participatory approach, hence the crisis of confidence.

My thesis is that accommodating traditional African concepts of procedural justice is difficult, unless procedural rights become a kind of normative bridge between the aims of international criminal justice and the values of localized communities. I propose using a translation model that draws from the operation of clan courts' de facto sentencing regime to create this normative bridge.[73] Using the Rome Statute, I show how the ICC may accommodate distinctive features of clan courts by applying principles derived from national law, in a manner that is consistent with international human rights law- Article 21 (1) (c) and (3). These principles include, in my view, traditional norms and values recognised in Article 126 (1) of Uganda's constitution and communitarian duties recognised in the African Charter (Articles 17, 27 and 29). However, integrating traditional justice raises important questions about the way in which universal human rights norms, specifically the right to a fair trial, could be applied in a culturally diverse context under the auspices of international criminal procedure.

This question has been considered on the fringes of academic literature. Findlay and Henham propose the integration of an 'expanded notion of individual and collective rights, centrally within a normative framework for international criminal trials', which accommodates both the restorative and retributive paradigms of

[71] *Ibid*, para 4.1 at 30. Emphasis added.
[72] Uganda Law Reform Commission, *Draft Study Report of the Laws on Sentencing* (Kampala: Uganda Law Reform Commission, September 2006) 109-111.
[73] A normative bridge simply refers here to the bringing together of two divergent normative standards of international and traditional customary laws. An overview of the translation model is in Section 4 *infra*.

international criminal justice.[74] Meanwhile, M. Drumbl's cosmopolitan pluralist model integrates non-legal local traditions into international penology. Drumbl's proposal is for a *vertical*-bottom up approach to procedure and sanction, where *in situ* (local) justice modalities are accorded a presumption of deference but subject to qualification.[75] I agree with both propositions that a local procedural approach can offer lessons to international law on alternative ways of achieving this reconciliation. However, I go a step further to show how, by using the 'translation' theory, a traditional notion of rights applied by clan courts could be adapted to achieve a procedurally legitimate, culturally appropriate sentencing outcome. This contrasts with existing theories that fail to draw on local African experiences. For instance, Drumbl sees little value in 'irresponsible' veneration of a local process merely to promote 'pluralistic difference as an end in itself'.[76] Even so, I maintain that it is from examining pluralistic difference at a micro clan court level, that lessons in reconciling divergent procedural approaches become apparent.

My argument assumes a system of African customary law that should be *lex legitima* and recognised by international and national law on a juridical and constitutional basis. In Uganda, African customary law is arguably a discernible branch of law of jurisprudential significance and operates side by side with other laws.[77] Customary law has similar features to any written law: limits and sanctions are known and publicised through oral tradition; absolute conformity is demanded from its members; so in this sense it is positive law.[78] Furthermore, ethical theory and rules of conduct can be found in a code of 'tribal' law.[79] 'Tribal' laws protect rights of a communitarian nature consisting of values like the duty to kin, reconciliation, restitution and the role of ritual. The latter is regarded as inseparable from restitution.[80]

My interest in this work arises out of intellectual considerations that comprise three factors. Firstly, the legitimacy of African customary criminal law is controversial

[74] M. Findlay and R. Henham, *Transforming International Criminal Justice: Retributive and Restorative justice In the Trial Process* (Cullompton: Willan Publishing, 2005) 331.
[75] M. Drumbl *op cit*, Chapter 7, 186-191.
[76] *Ibid*, 13.
[77] J. M. N Kakooza, 'The Application of Customary Law in Uganda' (2003) 1 (1) *The Uganda Living Law Journal* 23-42, 23-24. He examines the application of customary law to marriage and succession.
[78] F. G Burke, *Local Government and Politics in Uganda* (New York: Syracuse University Press, 1964) 64.
[79] J.H Driberg, 'Primitive Law in Eastern Africa' (1928) 1 (1) *Africa: Journal of the International African Institute*, 63-72, 71; T. Elias *op cit* at 189 and J. H Driberg, 'The African Concept of Law' (1934) 16 (4) *Journal of Comparative Legislation and International Law*, 230-245: 231-232 and 238.
[80] J. H Driberg (1928) *op cit* 69-70.

because despite its abolition as a penal law within Uganda, it operates among local communities as a de facto sentencing regime. Secondly, there is a scarcity of empirical research on the contemporary sentencing practices and jurisprudence of traditional African courts. This is particularly true of the Jopadhola clan courts that, as my empirical study will demonstrate, have something worthwhile to contribute to solving this dilemma of reconciling competing notions of procedural justice to achieve legitimate sentencing process.[81] Thirdly, the competing goals of individual rights and communitarian values have not been adequately addressed by international criminal courts in their sentencing practice and jurisprudence. Both international practice and jurisprudence may thus be perceived as procedurally deficient by local communities.

Obvious objections may be raised at such attempts to provide for traditional restorative justice in international criminal procedure. It might be objected that international procedures and outcomes, if they are to be seen by locals as legitimate, will have to be very different depending on the legal and traditional context into which those judgments are received. It could be argued that adopting such an 'expansionist' approach, involves surrendering to the traditional and will lead to lesser protection of rights in some instances. Another problematic area is the possibility of bias on my part in favour of traditional restorative process and communitarian values. However, I view these as more technical issues *in* rather than as insuperable obstacles *to* the development of a liberal –communitarian notion of procedural justice. I deal with these objections by presenting a critical analysis of the topic, and making arguments in favour of developing a translation model as a theoretical solution. I now describe my working definition of central concepts in the next section.

Section 4: Central concepts defined

The complexities of the legal argument outlined above, demonstrate the need for a definition of central concepts that I use in this thesis. These are procedural justice, sentencing, procedural rights and rights in a communitarian setting, clan courts, traditional clan law, precedent, and translation.

Procedural justice is likely to mean different things to different groups both international and local, depending on the vagaries of interpretation by adjudicating

[81] This the first empirical research that has been carried out on trial procedures in clan courts among the Jopadhola.

bodies.[82] By procedural justice, I mean the fair administration of procedural rules based on protection of rights during the sentencing phase. I adopt the definition given by the ILC that fundamental procedural guarantees inherent in a fair trial also extend to the sentencing hearing.[83] For me, procedural justice should combine the application of procedural rules and due process, using the shared features of the international and traditional model, while mitigating any differences so as to find a nexus upon which procedural rights can be anchored. I am therefore proposing that the debate on international procedural rights ought to be broadened beyond the legalist focus on individual rights.

I use the term sentencing- meaning the giving of an appropriate punishment in relation to the individual and crime[84]- to describe a separate phase distinct from the trial. The main phases of trial procedure are collection of evidence,[85] and determination of the offender's guilt. Unless otherwise indicated, my scope of investigation is sentencing procedure in the ICC Trial Chamber. My assumption is that both international and traditional models include a sentencing phase. Sentencing is a feature of trial procedure that symbolises society's sanction of the offence. It attempts to give a legitimate punishment that does not exceed the offender's culpability, bearing in mind the principle of proportionality.[86] Since I argue that sentencing hinges on society's evaluation of an offence, I widen the scope of sentencing to include the community, borrowing from Drumbl's vertical bottom-up approach and Findlay and Henham's retributive-restorative justice model. This may seem to run contrary to the international model where judicial sentencing arguably developed to protect defendants against arbitrary punishments imposed by a prejudiced or vengeful community. I maintain that legal pluralism persists anyway, and society's 'evaluation' is in practice channelled at the local level through regularised systems and norms that involve protections for the

[82] The term 'international' is used in a generic sense to cover the international community of nations, the ICC, international ad hoc tribunals like ICTR on whose procedural framework the ICC is built; and hybrid tribunals like the SCSL. Adjudicatory bodies are the ICC, ad hoc tribunals, hybrid tribunals, national courts and clan courts.

[83] *Report of the ILC on the Work of Its 46th Session, op cit* on the Commentary on Article 46 (1) Draft ICC Statute.

[84] *Ibid*.

[85] C. Safferling *op cit* 314-31 points out that collection of facts can be presented in two structural models: by parties (adversarial) or inquired by the judge (inquisitorial), but I propose a third structural model in which collection of facts is done by the community using a participatory approach.

[86] *Ibid*, 314. Safferling makes a compelling argument that the extent of punishment should not be considered as an automatic consequence of the verdict, every case must be decided on its merits to avoid treating the offender like an object of the trial.

defendant. Moreover, it is at the sentencing stage that the traditional and international procedural frameworks strongly conflict each other.

A procedural right grants the holder a realizable legal claim and derives from a legal procedure that helps in the enforcement of a substantive right.[87] Procedural rights or the right to 'procedural fairness,' are one of the three components that constitute the right to a fair trial. The other two are institutional guarantees and legal principles like equality of arms.[88] I develop my point from arguments advanced by S. Zappala that fair trial rights of the accused in Article 14(3) ICCPR ought to apply during sentencing.[89] What I wish to argue is that offenders, victims and communities should all be regarded as legitimate holders of procedural rights. Procedural rights during sentencing would thus cover both individual rights and communitarian values.[90] The rights discussed in this thesis are not exhaustive of all procedural guarantees under Article 14 ICCPR. Rather, I select those that are most likely to be controversial from a traditional perspective, like the right to legal representation.

Rights in a communitarian setting are defined as the right of one kinship member being the duty of the other and the duty for the other kinship member is the right of another.[91] Some like Gyekye, have described this to mean that individual rights are abridged by social responsibilities in so far as curtailing individual rights is necessary to maintain the integrity and stability of the group.[92] Others like Cobbah maintain that social roles within kinship are rights which each member possesses and duties which each member has towards kin. In short, entitlements and obligations form the basis of the kinship system.[93] I combine this communitarian notion of rights with rights of the

[87] B. A Garner, (ed.) *Black's Law Dictionary* 8th Edition (Minnesota: Thomson West, 2004), 1348-1349. A. Gerwith *op cit* holds that rights also involve a normative necessity: 48-49.

[88] C. Safferling *op cit*, 31. He calls these 'moral' principles and defines all three components as the right to procedural fairness. H. Friman, 'Procedural Law of Internationalised Criminal Courts' in C. P. R Romano, A. Nollkaemper and J. K Kleffner (eds.), *Internationalised Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (Oxford: Oxford University Press, 2004) 353- 354, also uses Safferling's definition of the three components as part of the right to a fair trial. I find these definitions appropriate.

[89] S. Zappala *op cit* 199-208. A similar argument is made by R. Henham, 'Procedural Justice and Human Rights in International Sentencing' (2004) 4 (2) *International Criminal Law Review* 185-210, 190-191.

[90] C. Safferling *op cit* 42 posits that human rights are a legal position that human beings occupy regardless of their status and time, which is analogous to a fair trial. My definition stretches this interpretation to include the community.

[91] N. Sudarkasa, 'African and Afro-American Family Structure: A Comparison' (1980) 11 *Black Scholar* 37-60, 44.

[92] K. Gyekye, *Tradition and Modernity: Philosophical Reflections on the African experience*, (New York, Oxford: Oxford University Press, 1997) 65.

[93] J. A. M Cobbah, 'African Values and the Human Rights Debate: An African Perspective' (1987) 9 *Human Rights Quarterly*, 309-331, 320-321.

accused to a fair trial in Article 14 (3) ICCPR.[94] In sum, individual rights can be perceived as interconnected with a duty to community and to the communitarian way of life. These communitarian 'rights' I call 'communitarian values', for they encapsulate communal values of duty to kin, restitution, reconciliation and the role of ritual.

Clan courts refer here to kinship courts that hear cases of a criminal nature within a social group from the same extended family lineage. This is part of what anthropologists call kinship organisation.[95] I use the term 'traditional clan law' as distinguishable from 'African customary law' for expediency. I refer to the traditional clan laws as 'legislation', applied in contemporary times by clan courts and binding on both the community and individual. I am aware that the term implies uniformity of African customary law which is far from the case, but I use it here to refer to the traditional law of any particular African community. I adapt this phrase from Nabudere's 'New traditionalism' where African customary law was socially engineered by the colonialists to function under indirect rule and has survived.[96]

Precedent is used in its doctrinal sense as a prior judicial decision.[97] The conditions for the development of precedent set by Koopsman are that the main rules are unwritten, the court should function as a unifying element in a legal system and there is a necessity of resorting to principles.[98] There is evidence that increasingly international law is becoming case law with a range of admissible precedents applied by international bodies not only to substantive law but also procedural law.[99] The assumption I make here is that the juridical worth of case law both as persuasive and binding precedent, will help ensure consistency and predictability of sentencing outcomes when advanced through the international system.

[94] The Human Rights Committee in *ICCPR General Comment 13* of 13/04/84 stated that Article 14 applies to procedures to determine rights and obligations of an accused in a suit at law.
[95] P. Kirchloff, 'Kinship Organization: A study of Terminology' (1932) 5 *Africa: Journal of the International African Institute*, 184-191.
[96] D. W Nabudere, 'Towards the Study of Post Traditional Systems of Justice in the Great Lakes Region of Africa' (2002) 8 (1) *East African Journal of Peace and Human Rights* (*EAJPHR*) 1-40, 4.
[97] I combine the descriptions by N. MacCormick and R. Summers in *Interpreting Precedents* (Hants: Ashgate Publishing Company, 1997) 1; with M. Shahabuddeen's *Precedent in the World Court* (London: Cambridge University Press, 1996) 8.
[98] T. Koopsman, 'Stare decisis in European Law' in David O'Keefe and Henry G. Scherners (eds.), *Essays in European Law and Integration* (Kluwer: Deventer, 1982) 14-17.
[99] M. Shahabuddeen, *op cit* depicts how international law slowly resembles the common law of England 15-16, 18.

Translation, a term I adapt from M. Langer, refers to *translation* of legal ideas (doctrines or norms) and institutional structures, as contrasted with legal *transplants*.[100] Legal transplants occur where legal ideas and structures are applied unmodified in a recipient country. This leaves the effect of a 'copy and paste model'.[101] For example, the ICTR Statute and its RPE are grounded in individual human rights philosophy. These are applied wholesale in a community that adheres to a traditional Rwandese Gacaca justice system that applies communitarian values. Applying international criminal procedural norms in local communities, leads to what Drumbl aptly calls 'externalised justice'.[102] Conversely, in legal translation, legal ideas and institutional structures are transformed through assimilation or *borrowing* from the 'other' and melding them together. This may be through changes to procedural powers, individual dispositions and structures of interpretation.[103]

The first aspect of translation in my model, takes into account structural transformations within the receiving system, following changes in dispositions (or procedural approach) by key translators (judges).[104] For instance, borrowing from traditional participatory processes, may involve modest transformation to the ICC sentencing practice that is presently based on sole judicial discretion. The second aspect of translation considers transformations to the structures of interpretation, in the recipient system.[105] In borrowing this concept, I adjust it to include the doctrine of judicial precedent as a legal tool through with the translators (judges) may interpret principles, norms or how a procedural rule or system ought to work in a different procedural model. For example, the ICC in applying principles of national law under the Rome Statute, could, arguably, apply precedent from national courts on traditional restorative processes and traditional sentences. In so doing, judges could transform the normative framework by applying an expanded notion of procedural rights during

[100] M. Langer, 'From Legal Transplants to Legal Translations: The Globalization of Plea bargaining and the Americanization Thesis in Criminal Procedure' (2004) 45 (1) *Harvard International Law Journal* 1-64.
[101] *Ibid*, 5-7, 33-35.
[102] M. Drumbl *op cit* 14 and Chapter 5.
[103] M. Langer *op cit* 10-14. Translation is defined in detail in Ch.3 S.5 *infra*.
[104] I adopt this from Langer *ibid*, 11-13. I focus on individual disposition because unlike procedural powers (functions) of judges that are specified by law under the Rome Statute, disposition is the way in which judges are predisposed to understand criminal procedure and their role, based on their legal training. Arguably, it is in through disposition or procedural approach that small changes may be made without infringing on procedural powers in the Rome Statute.
[105] Legal doctrine according to Langer is an influential aspect of American law that has been transplanted in parts of the world: *ibid* 2. His extensive study of the Italian, French, German and Argentine civil law plea bargaining procedures, examines the extent to which the American system, through a 'weak' thesis of 'Americanisation', has influenced their legal doctrine and institutional arrangements: 39-62.

sentencing. The ICC could thus accommodate values of localized communities without infringing on international human rights standards.

The concept of translation is appropriate where an institution needs to accommodate divergent normative features. Indeed, when examined against traditional restorative justice imperatives, the international sentencing framework has room for some aspects of the traditional model, although it does not always protect communitarian values. This need for translation is better understood against Uganda's background, discussed in section 5 below.

Section 5: Uganda's historical, political and legal background

In order to set the scene for my analysis, it is important to say something about the recent history of Uganda and its legal structure. In this section, I argue that the historical background to legal pluralism masks the political tensions of indirect rule and the problems that arose from the cultural domination of the Baganda ethnic group over other Ugandan groups. I examine the outcome of the imposition of Buganda's traditional court structure and administration system onto other ethnic groups, and how resistance manifested itself. The present court structure and constitutional developments are partly a consequence of this resistance.

(i) Historical background

Uganda is in East Africa at the centre of the Great Lakes region, with Kenya to the East, Sudan to the North, Democratic Republic of Congo to the West, Rwanda to the South West and Tanzania to the South.[106] Uganda has a population of 24.4 million people[107] made up of 65 ethnic groups[108] categorised into 4 linguistic groups: Bantu, Nilotic, NiloHamitic and Sudanic.[109] These linguistic groups are culturally

[106] Territorial boundaries of Uganda are delineated in the 2nd schedule of the constitution *op cit* under Article 5 (3) and are illustrated in Figure 1.
[107] Uganda Bureau of Statistics, *The 2002 Population and Housing Census, Population Composition* (Kampala: Uganda Bureau of Statistics, 2006) vii, Table 3.3 page 12.
[108] 56 ethnic groups are listed in Schedule 3 constitution *op cit*. S.48 of the Constitution (Amendment) (No.2) Act 2005 amends Schedule 3 by adding 9 groups, bringing the total to 65.
[109] H. F Morris and J. S Read, *Uganda: The Development of its Laws and Constitution* (London: Stevens and Sons, 1966) 237.

heterogeneous with diverse political structures. Their geographical distribution is illustrated in Figure 1.

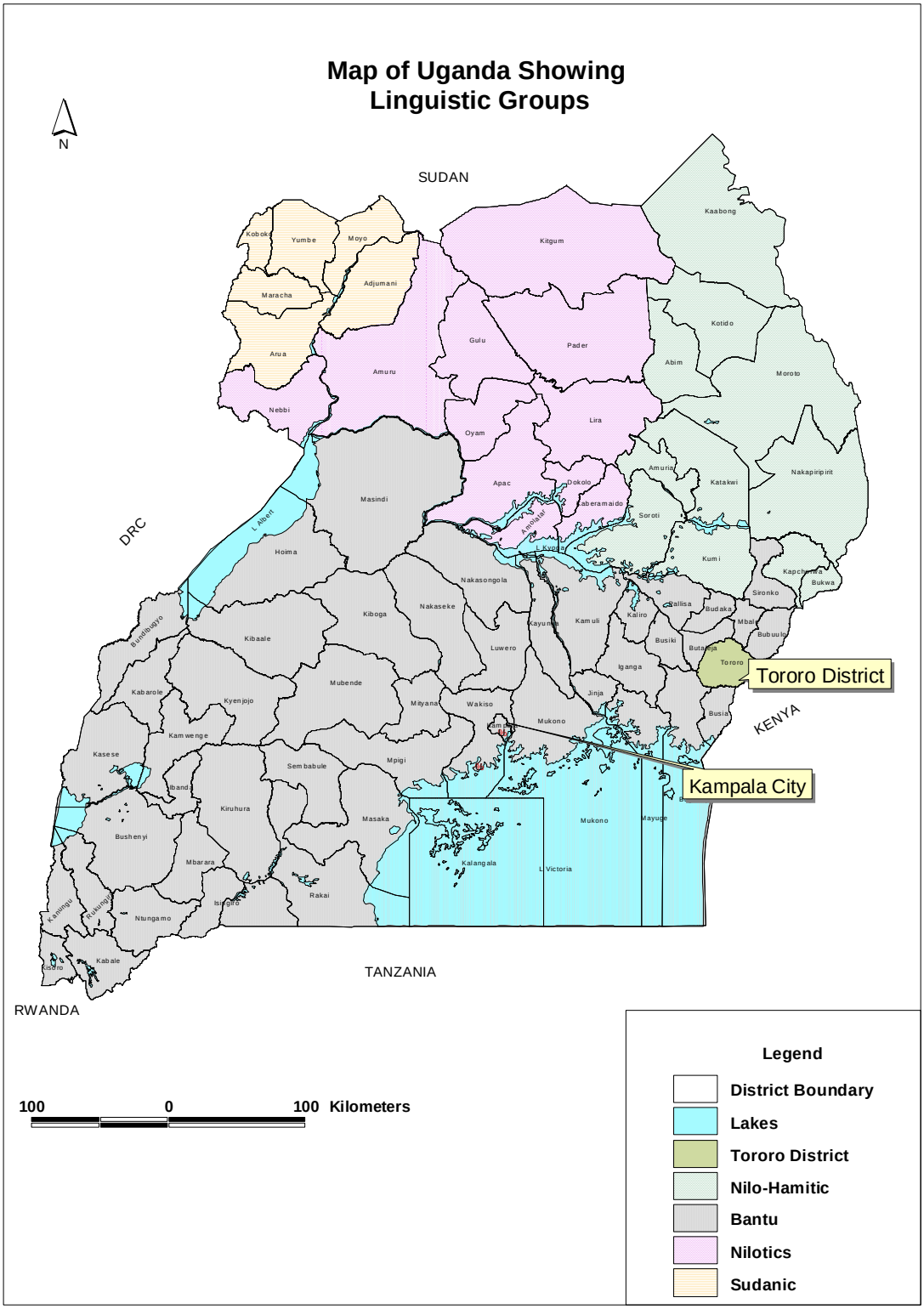

Figure 1 Map showing linguistic groups in Uganda. © Department of Mapping and Surveying, Entebbe, Uganda (2007)

My interest is in the customary practices of the Nilotic group referred to collectively as Luo or Lwo,[110] and the Jopadhola ethnic group in particular.

The history of Uganda traces its development from the pre-colonial era *circa* 1500-1890, when the country comprised a diversity of kingdoms, chiefdoms and 'stateless' communities, each with their own system of social control.[111] The Bantu had kings and chiefs and were organised in closely knitted clusters of clans, with the paramount head of the clan or kingdom (a cluster of clans that form the bigger community) as the political leader. The other groups were organised in loose kinship units[112] without a central leader. Despite this divergence in political authority, there was some commonality in customs relating to the trial and sentencing of offenders.

The pre-colonial criminal justice system focussed on vindicating the victim and their rights, so the sanction was compensatory rather than punitive.[113] The main procedural features in customary trials were the identification of the perpetrator; their admittance of guilt (both individual and collective guilt); the process of individual or collective purification and reparation or compensation for the wrongs done. To promote equilibrium in the society, the offender was forgiven by the victim and peace was made, marked by the sharing of a meal as part of the reconciliation.[114]

Procedural differences related to the type of society. For example, in centralised societies, decisions were made by chiefs or kings. Among the loose kinship groups like the Jopadhola, decision making was collective. During the colonial era (*circa* 1890-1957) Britain made Uganda a protectorate. Tensions between the two systems arose out of political manoeuvres to impose the English legal system over the local one, without taking into account existing traditional criminal laws.[115] The English common law and

[110] Nilotics encompass the Acoli, Lango, Kumam, Jopaluo of Bunyoro, Alur, Luo and the Jopadhola ethnic groups: E. E Evans-Pritchard, 'Nilotic Studies' (1950) 80 *Journal of the Royal Anthropological Institute of Great Britain and Ireland,* 1-6. There are anthropological distinctions made by Evans-Pritchard between the Shilluk Luo comprising the Nilotics of Uganda (*ibid* note 26) and historical differences described by B. A. Ogot, *History of the Southern Luo: Vol.1 Migration and settlement 1500-1900* (Nairobi: East African Publishing House, 1967) at 32, between the two groups of Luo: Group A comprise the Shilluk, Acoli, Lango and Palwo and Group B the Alur, Jopadhola and Kenya Luo. Since these distinctions are not of great importance in this study, I shall use the ethnic group names to identify the individual groups.

[111] G. W Kanyeihamba, *Constitutional and Political History of Uganda: From 1894 to the Present* (Kampala: Centenary Publishing House Ltd, 2002) Chapter 1, 1-4.

[112] D. Nsereko (1995) *op cit*, 19.

[113] D. Nsereko (2002) *op cit*, 22-25.

[114] P. Nyaba, 'The Grassroots Peacemaking in South Sudan' (2002) 8 (1) *East African Journal of Peace and Human Rights,* 97-110, 104.

[115] E. Beyaraza, *Social Foundations of Law: A Philosophical analysis* (Kampala: Law Development Centre Publishers, 2003) at 112 citing J. M. N Kakooza 'Uganda's legal history in a nutshell' (1993); also J. Oloka-Onyango, 'Law, Custom and Access to Justice in Contemporary Uganda: A Conceptual

its court systems now operated alongside the local kinship courts that applied traditional clan law. This changed the features of criminal procedure in quite fundamental ways as explored below in sub-section (ii).

(ii) Political background

On June 19th 1894 Uganda became a British protectorate.[116] The country was subjected to 'Indirect Rule' through which the different ethnic groups continued to administer their territories using traditional clan law and adjudicated their crimes in a like manner.[117] However, a system of government from Buganda (the kingdom with the largest Bantu ethnic group) was imposed on other groups to expedite the colonial rule. This was a result of scarcity of European administrators and so the recognition of existing chieftainship beyond the village level was inevitable.[118] The imposition of Buganda administration substantially changed decision making in the clan, from kinship units to a chief imposed by the colonial administration. This chief imposed by the state, had legislative and judicial powers to preside over the clan courts.[119]

In practice, however, Buganda administration failed to triumph over kin-based societies that had no central authority. The Jopadhola, for instance, were traditionally unaccustomed to the system of chief hierarchy, and exhibited strong anti-authority sentiments.[120] Despite lack of any central authority, the Jopadhola were held together by a tribal consciousness which was the worship of a deity called *Bura* and an emphasis on responsibility to the clan. Consequently, the structural process that evolved was a reinforcement of clan cohesion through mysticism and collective decision making. Each clan court system was independent of the other but retained features of the traditional restorative justice model.

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and Analytical review' paper prepared for *New Frontiers of Social Policy* World Bank Conference (Dar Es Salaam, 2005), Part II para. 2.1-2.2 explores the history of these manoeuvres.

[116] H. Morris and J. Read *op cit*, Chapter 1 and G. Kanyeihamba *op cit* 6-10 describing the process.

[117] J. Oloka-Onyango *op cit* Part II para 2.1-2.2 on the jurisdiction of clan courts during the colonial era.

[118] M. Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Kampala: Fountain Publishers, 2004) in Chapter 3, 85, gives an excellent analysis of this political move. Also S. R Karugire, *A Political History of Uganda* (Nairobi, London: Heinemann, 1980) Chapter 3.

[119] M. Mamdani *ibid*, Chapter 4 especially 117- 128 where he identifies the weak process of state formation through compulsion as a result of the need to create a market economy. The fastest way to achieve this, he argues, was to give the chief consolidated powers of judge, legislator and executive.

[120] F. Burke *op cit* 219: describing how in the 1960s, large crowds of up to 10,000 people would attack chiefs and European district officers, aiming to kill them.

Circa 1894–1962, Uganda as a Protectorate had no formal protection or promotion of human rights because the colonial rulers usurped the power of the indigenous ethnic groups to define their own rights and interests.[121] The 1962 Independence constitution guaranteed the retention of customary authority, though it granted a superior status to Buganda. This is because through the Buganda kingdom, the British protectorate was established, from where it gradually spread to the rest of Uganda. The rest of the country comprised smaller kingdoms,[122] chiefdoms and segmented societies like the Jopadhola, who all fell under this ill defined arrangement.[123] The constitution also embodied a Bill of Rights based on the ECHR, which outlawed unwritten penal laws under Article 24 (8) and by implication, traditional clan laws and their procedural rules. Clan courts survived because- as is exemplified by the Jopadhola, for many, clan courts as part of the kinship organisation was the everyday government responsible for sanctioning certain behaviour and prohibiting others.[124]

The 1962 constitution was abrogated by the 1966 constitution that abolished the kingdoms and other traditional rulers (Article 118). In the following year, the 1967 Constitution declared Uganda a Republic. The Bill of Rights in Chapter 3 remained unchanged.

Post independence Uganda was politically unstable. The most destructive regime was that of Idi Amin that saw the suspension of the constitution, abolition of parliament and destruction of the judiciary. During this time, 'official' courts of law on the one hand existed marginally with little effective jurisdiction.[125] The clan courts on the other hand survived, filling a vacuum created by the weakened official court system.

Uganda is now a Republic where all arms of the state are enjoined to uphold the rule of law. A new Constitution of 1995 restored traditional leaders and created a new Bill of Rights in Chapter 4, but retained Article 28 (12) that outlaws unwritten penal law. Article 37 protects the right to practice one's culture. Furthermore, under the cultural objectives of the constitution, the state is obliged to promote and preserve

[121] M. Senyonjo, 'The Domestic Protection and Promotion of Human Rights under the 1995 Constitution' (2002) 20 (4) *Netherlands Quarterly of Human Rights* 445-483, 447-448.
[122] These included the kingdoms of Ankole, Bunyoro, Toro and Busoga.
[123] J. Oloka-Onyango, 'Constitutional Transition in Museveni's Uganda: New Horizons or Another False Start?' (1995) 39 (2) *Journal of African Law* 156-172, 157-159. On the constitutional developments in Uganda during this period, see Morris and Read, *op cit*: Chapter 3.
[124] F. Burke *op cit* 189.
[125] D. Nsereko (1995) *op cit* 18-19. The abolition of the rule of law lasted 8 years (1971-1979).

cultural values and practices that promote the dignity and well being of Ugandans.[126] This constitution also has an article not found in any other African constitution: Article 126(1) enjoins courts of law to exercise judicial power in accordance with the law and the 'values, norms, and aspirations of the people'. This provision creates space for the continued operation of traditional clan law at some level within the national court structure.

The state of legal pluralism that gradually evolved continues to exist today, despite legislative attempts to abolish traditional clan criminal law. Legal pluralism now consists of two procedural traditions. On the one hand, the national system based on common law trial procedures buttressed by due process, and on the other, a traditional restorative justice process based on communitarian values.

(iii) Court structures

The legal structure of the 'official' courts in Uganda is common to that of the rest of Anglophone Africa because it is based on English common law[127] though with its own unique hierarchy of courts. The first tier comprises the High Court, Court of Appeal- also sitting as a Constitutional Court, and the Supreme Court. Collectively, their jurisprudence constitutes binding precedent for Magistrates and other subordinate courts.[128] The second tier comprises Magistrates courts. Together, both tiers are referred to as the judiciary. The hierarchy of courts is illustrated overleaf.

At the lowest rung are the local council courts. These are not strictly courts of law but have unique quasi-judicial status. They are run by the members of the community and handle only civil cases, except for specific offences involving children over which they have criminal jurisdiction.[129] The lower level courts comprise the entire executive committee of the village or parish. Local council courts fall under the Ministry of Local Government, although the Chief Magistrates' courts can hear appeals from them.[130]

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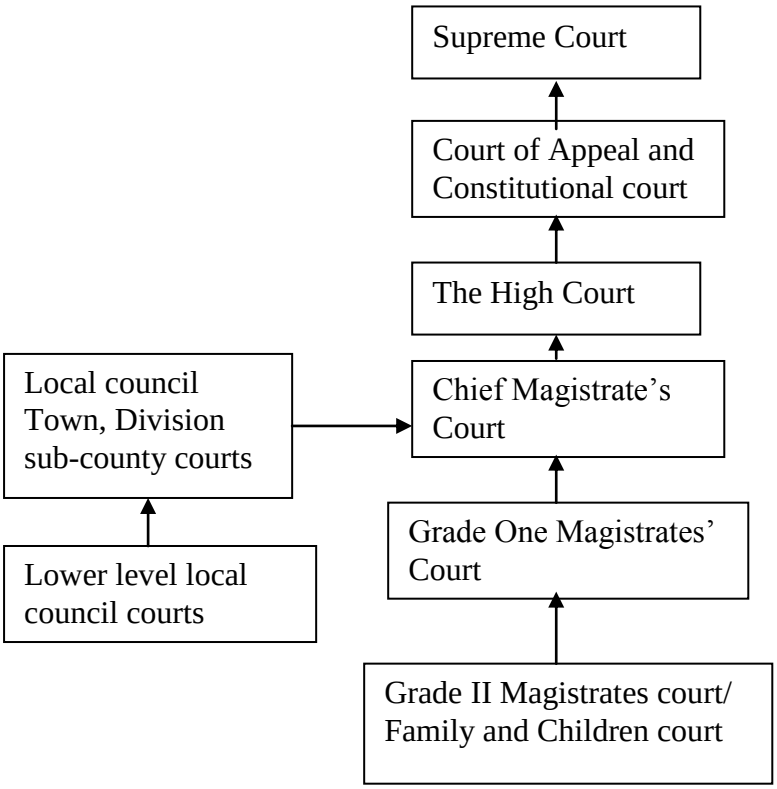
[126] Uganda constitution *op cit*, National Objectives and Directive Principles of State Policy: Cultural Objective (XXIV) (a).
[127] H. Morris and J. Read *op cit* 237.
[128] They are superior courts of record as defined in the constitution *op cit* Article 129(2). Other courts include the Family and Children courts, the Courts Martial and the Industrial Court.
[129] Local Council Courts Act 13/2006, (Section 10). The Act establishes these courts for the administration of justice at the local level. S.49 (2) (a) limits their criminal jurisdiction in respect to children, to specified offences like common assault and theft that fall under the Penal Code Act, Cap 120.
[130] *Ibid*, Section 4 (1) on the composition of the village and parish court. Under S. 32 (2) (c) the Chief Magistrate's court can only hear appeals from decisions of a town, division or sub county court. Appeals

Figure 2: The Hierarchy of the court system in Uganda



At the next level are the Magistrates' courts with original jurisdiction to hear both civil and criminal matters, including civil customary law under Section 10 of the Magistrates Courts Act (MCA). They are not courts of record. Magistrates' courts are ranked as Grade II, Grade I or Chief Magistrate. The latter has powers to hear appeals and revisions from the lower courts.[131] Criminal cases are heard by Grade I Magistrates or Chief Magistrates: professional lawyers (advocates) sitting alone. Grade II (lay) magistrates also sit alone and try cases.[132] For example, in the Family and Children court, children are tried by a lay Grade II Magistrate.[133]

from the lower level local council courts are heard by the parish court then town, division or sub county court: S. 32(2) (a) (b).

[131] Magistrates Courts Act (MCA) Cap 16 S.4 (2) sets out the grades of magistrates courts. Under S.15, a magistrate's court may enforce the observance of custom that is not 'repugnant to natural justice, equity and good conscience'. S. 204 provides for the Chief Magistrate's appellate and revision powers.

[132] Magistrates' Courts (Amendment) Act, 2007 S.1 amended S.4 MCA and abolished the post of Magistrate Grade III courts. Eventually Grade II magistrate courts will also be abolished. According to the Chief Justice, 'In the next 10 years the entire magistrates' bench will be professional to contain the case backlog': *Daily Monitor* 18th Feb 2008.

[133] S. 13 of the Children Act Cap 59 establishes Family and Children Courts. A child under S.2 is any person below the age of 18 years.

Next is the High Court with unlimited original jurisdiction in civil and criminal matters.[134] Under Section 14 (2) of the Judicature Act, the High Court may apply, among others, established and current custom or usage. The court also has appellate jurisdiction to hear appeals and revisions from decisions of the Grade I and Chief Magistrates' court.[135] All sittings of the High Court are presided over by judges who sit alone and hear cases.

There are two further appellate courts: the Court of Appeal and, higher still, the Supreme Court. The Court of Appeal is a second tier appellate court[136] that hears appeals from decisions of the High Court[137] and in certain circumstances, second and third appeals from magistrate's courts.[138] The Constitutional Court sits to hear constitutional matters only and is made up of the judges who constitute the Court of Appeal bench.[139] The Supreme Court is the final appeal court[140] headed by the Chief Justice who is also the head of the Judiciary.[141] The Supreme Court has appellate jurisdiction within the territorial limits of Uganda.[142]

Procedural rules in criminal matters are governed generally by the Trial on Indictments Act (Chapter 23), Magistrates Courts Act (Chapter 16) and Criminal Procedure Code (Chapter 116). All are modelled on the 1898 Indian Code of Criminal Procedure founded on English law.[143] Rules of evidence are set out in the Evidence Act (Chapter 6). The appellate courts each have their rules of procedure set out in subsidiary legislation.[144] Penal sanctions include the death penalty, imprisonment, fines, compensation and community service.[145]

The 'official' court structure excludes clan courts yet they are active, on a par with the Ugandan judiciary in the local communities where they operate and have similar powers of adjudication, sentencing and appellate procedures. Through my

[134] S. 13 &, Part IV Judicature Act, Chapter 13; and Articles 138-139 of the constitution *op cit*.
[135] *Ibid*, S. 14. 1S. 16 Judicature Act and Article 138 – 140 constitution, give appellate jurisdiction.
[136] *Ibid*, S. 9 Judicature Act and the constitution, Article 134-135, 136 (1) (b).
[137] *Ibid*, S. 10, 11 Judicature Act and S. 45 Criminal Procedure Code, *op cit*.
[138] *Ibid*, S. 46 Criminal Procedure Code: third appeals from Grade II courts may be heard on a matter of great importance or a question of law.
[139] Constitution *op cit*, Article 137.
[140] Established under S. 3 Judicature Act *op cit* and Article 132 (1) constitution *ibid*.
[141] *Ibid*, Articles 130 (a), 133(1) (a).
[142] Judicature Act *op cit* S. 4- 5.
[143] Uganda Order-In-Council 1902.
[144] The Supreme Court Rules Directions 1996 S.I 13-11/1996 and the Court of Appeal Rules Directions 1996 S.I 13-10/1996.
[145] Penal sanctions are prescribed for each offence in the Penal Code Act, *op cit*; and in any legislation that prescribes penal offences like the Witchcraft Act, Chapter 124. An overview of national Sentencing laws is in Appendix 10.

empirical study, I will demonstrate the functionality of these clan courts within a community participatory process, in providing generalised lessons for domesticating international sentencing in Africa. I now explain briefly the methodology that I used.

Section 6: Methodology

To date little attention has been paid to communitarian values in traditional restorative justice process. To bridge this knowledge gap, I conducted a small empirical study with clan court heads to see how they interpret complex notions of individual rights during sentencing. Before examining these substantial findings directly, it is necessary to outline the methodology used in this thesis which I do in this section. Details of the methodology are in Appendix 1.

The objective of the thesis is to seek to reconcile international sentencing hearings with values of localized communities through an application of procedural rights. To achieve this objective, I use two approaches. Through these two approaches, the capacity of the international system to accommodate aspects of the traditional restorative justice system will become clear. The first approach involves a legal analysis of the international and traditional sentencing frameworks to examine similarities and tensions between them, in light of human rights imperatives. The second approach involves the use of empirical methods. I will present the results of an empirical study I conducted in 2006, of clan courts of the Jopadhola ethnic group in Tororo district (Eastern Uganda). Jopadhola clan courts apply traditional clan law using traditional restorative processes.

The aim of the study was to examine empirically the processes by which clan courts assimilate judicial and interconnected national structures, and individual rights into traditional restorative justice. I believe the years of experience of clan court officials', makes them well positioned to speak authoritatively and reflectively about issues affecting integration of transplanted law and due process implications. I focus on the clan courts of the Jo-Gem (or Jo-Gemi)[146] and Morwa Guma Malasang (hereafter 'Morwa Guma') clans in Budama North constituency of West Budama County; comprising the sub counties of Kirewa, Kisoko, Petta, Paya and Nagongera.

[146] The names are used interchangeably, with the former being the official spelling in historical and anthropological texts. I use Jo-Gem in this thesis.

The choice of these two clans is because they are a good archetypal sample of clan experiences as illustrative of how clan courts solve a theoretical problem of reconciling structurally divergent procedural frameworks.[147] In this sense, I am not just presenting a study of 'typical' Uganda traditional justice. A study of 'stateless' societies is important to show how they translate legal structures and ideas in the *absence* of a centralised leadership and prescriptive framework. Their interpretation of law gives salutary lessons on how similarities are harnessed and how divergence may be mitigated.

The choice of methodology arises from the complexity of issues (both theoretical and methodological) in this type of restorative justice research.[148] These include, in relation to the clan courts, dearth of archival documentation both academic and non academic, poor electronic communication, low levels of literacy in rural areas and the holistic context within which the sentencing process is addressed. To this end, three qualitative research methods were used.

Firstly, archival research techniques complemented other methods of information gathering. The methodological starting point was to examine available primary and secondary material including legislation, government publications, white papers, law reports, clan courts records, judgments of superior courts of record and widely circulated local daily newspapers: *The New Vision* and *Daily Monitor*. I also examined books, periodicals, legal encyclopaedias and mimeographs. These sources provided some information on the doctrinal and historical aspects of traditional justice within the human rights framework in sentencing practice. However, given the limited insights available from a doctrinal or statistical study, it was necessary to use interviews to fill in the gaps.

Next, unstructured and semi–structured interviews were used because they attain a higher response rate than any survey technique and generate better quality data.[149] In accordance with research regulations in Uganda, I applied for and was granted permission to carry out the research by the relevant Research Ethics body: Uganda National Council for Science and Technology. In practice, no ethical problems arose during the course of the study. Over a period of six and a half weeks from 27th July–

[147] A fuller explanation of my choice of clans to study is given in Chapter 6 S. 2 *infra*.
[148] C. T Griffiths 'Sanctioning and Healing: Restorative Justice in Canadian Aboriginal Communities' (1996) 20 (2) *International Journal of Comparative and Applied Criminal Justice* 311-314.
[149] C. M Judd, E. R Smith and L. H Kidder *Research Methods in Social Relations* (6th Ed.) (Forthworth: Texas: Holt, Rhinehart and Winston for the Society for the Psychological Study of Social Issues, 1986) 218. The response rate may be over 80%.

11th September 2006, un-structured interviews were held with people in various institutions like Makerere University, and the Judiciary. In all, 40 respondents were interviewed: 23 men and 17 women, whose details are in Appendix 4. Selection of respondents was based on their knowledge (or lack of) in the area of traditional justice as well as the position they held. Those interviewed included the Chief Justice, judges, academics, and public servants.

In August 2006, semi-structured interviews were used in the empirical study of clan court heads, in two stages: a pre-visit interview followed by a formal workshop. A 'pre-visit' refers to the preparatory visit made to the study area prior to the main interviews. I set up a pre-visit meeting to get more background information about the court systems and Jopadhola criminal laws. The meeting was also to establish when it was most suitable to carry out more interviews and to select participants. This is standard research protocol in Uganda. The second set of semi structured interviews was conducted on the 15th August 2006,[150] at a one-day workshop. In all, 25 participants attended: 7 women and 18 men. 7 were absent with apology, due to other engagements. I divided participants into 7 working groups representing 7 clan courts. These were the Gombolola, Miluka and Kisoko (Jo Gem clan), and the P'Oriwa, Saza, Gombolola and Miluka (Morwa Guma clan).

Each group was given a question guide in Dhupadhola, flip charts and markers. Participants read, discussed the questions and then wrote down their responses in Dhupadhola. This was a better method of recording than tape recordings for two reasons. In the first place, all groups were able to digest the questions and then answer the questions simultaneously. Secondly, I was able to move from group to group, seek clarity and re-direct the line of discussion where issues and written responses were not clear. Consequently all the questions were answered in depth and within the time frame.

The discussions canvassed the clan court members' views on: trial process in clan courts; who may make representations on behalf of the defendant; any rituals performed as part of the sentencing process; criteria by which moral culpability and responsibility of the offender is assessed; factors considered during sentencing; satisfying wishes of the victim, offender and the community; procedure for review of decisions; similarities between the procedure in clan courts and the Local council or

[150] This was the most convenient day for most participants because other days are reserved for community activities like the Market day. A second brief follow-up interview was carried out on the 17th August 2008 with the two clan heads.

Magistrate's courts; preventing bias in decision making and the challenges faced by clan courts.[151] I transcribed all responses from the pre-visit interview and workshop into the English language since I am proficient in both Dhupadhola and English.

Below are pictures of two discussion groups:

Figure 3: © Maureen Owor (2006). The Gombolola Jo-Gem discussion group

Figure 4: © Maureen Owor (2006). The Moriwa Guma P`Oriwa discussion group

[151] The semi structured questionnaire is in Appendix 2.

Thirdly, the study used a trial simulation in which two same-clan members were accused of having sexual relations (which is included within the definition of the crime of incest under Jopadhola clan laws). The simulation was by participants who are real clan court officials. This simulation was supplemented by a study of court records made available to me by the Namwaya Saza court of Morwa Guma. The success of the trial simulation depended on a high level of authenticity. Bearing in mind the inevitable constraints of trial simulation, in particular its verisimilitude to real clan court hearings, the findings suggest that there may nonetheless be some valuable lessons to be gleaned from the simulation about the application of human rights provisions in clan court trials. The plenary session followed, at which participants discussed the strengths and weaknesses of Jopadhola sentencing laws and issues concerning reconciliation of traditional with international trial process.

There were three main limitations. First, the archival research was unable to plug all important holes in the oral narrative. For instance, a request for the number of cases handled from 2000-2005 by clan courts was not responded to.[152] Additionally, the lack of a database of existing research studies meant I had to rely on individuals giving me their copies of documents or alerting me to the whereabouts of others. Secondly, some people were unavailable due to various commitments so I was unable to interview them. Thirdly, I was not able to attend and observe actual clan court hearings as none were scheduled during this time. However, I attended a ritual for removing a curse in Iyolwa.[153] Despite these set backs I was able to get sufficient information about the sentencing process from both the respondents and study participants.

While these limitations may arguably affect the reliability of the findings, the fact that all clan courts of Jo-Gem and Morwa Guma clans in Budama North were represented, gives adequate information on practice in these courts. Together then, the incorporation of archival research, interviews, simulation of real time trial re-enactments and a plenary discussion, mark out this study as ground breaking. I see this as an exploratory study that can contribute to the literature and expand the range of viewpoints and voices on consideration of traditional justice within international law. Significantly, these deliberations provide insight into the ways in which Article 76 sentencing provisions in the Rome Statute may be applied in the African context.

[152] This is despite reminders by phone and email during July-August 2007, February-March 2008 and a visit in August 2008.
[153] Chapter 7 *infra* S. 3 (v) (b).

Section 7: Layout of thesis

The thesis is set out in 9 chapters. Following this introductory chapter, Chapter 2 is where I start to develop the theoretical context within which this study is grounded. Here I discuss elements of traditional restorative justice and international sentencing procedure, and how human rights protections sit in relation to both. The ICC retributive procedural framework and traditional restorative justice processes; represent two different procedural paradigms with divergent philosophical underpinnings. Consequently, the notion of procedural rights is viewed differently in both paradigms: one is based on individual rights and the other on communitarian values. I conclude that for the ICC to bring these conflicting legal systems in harmony with human rights guarantees; there is need to consider competing arguments.

Chapter 3 then sets out the debate among African and international scholars surrounding the question of reconciling the traditional with the international normative frameworks. I show that there is a pre-occupation by the scholars with the dichotomy between the two justice systems based on their different philosophical underpinnings. Furthermore both sides fail to consider human rights as a linchpin to bridge the normative gap between the two traditions. In seeking to reconcile these differences, I argue that there is need to apply a pluralist interpretation of rights, namely liberal rights and communitarian values within a redesigned theoretical model. I call this the Translation model.

Chapter 4 investigates challenges to accommodating traditional restorative justice, through a critique of the sentencing practice and jurisprudence of the ICTR and SCSL. I show how the international sentencing framework exhibits a degree of normative rigidity. The challenge is more pronounced because of deference by the ICTR and SCSL to precedent from regional bodies like the European Court of Human Rights, whose decisions are inappropriate to local communities sentencing processes. I conclude that harmonisation is elusive, because of lack of legal guidance on an African notion of rights that is reconcilable with Article 14 ICCPR right to a fair trial.

Chapter 5 considers the African regional human rights framework, particularly the efficacy of the African Charter and its Principles and Guidelines. I analyse whether the African Charter, expounded by interpretations by the African Commission, provides a definition of a traditional notion of rights: one that resonates with local values and

Article 14 ICCPR. I also examine the work of the Inter American Court of Human Rights (IACtHR) to demonstrate how 'traditional' conceptions of remedy and outcomes could be applied without infringing on the purity of human rights standards. I conclude that the newly created African Court of Human and Peoples' Rights, ought to develop 'African' human rights jurisprudence, perhaps by borrowing from experiences of the IACtHR.

Chapter 6 analyses the first part of the empirical findings on the operation of the Jopadhola Jo-Gem and Morwa Guma clan courts. I examine what lessons the clan courts have for the ICC on how to 'borrow' structures and norms, without losing its universal protection of human rights. Although national courts have been superimposed over existing clan court structures, nonetheless clan courts have drawn from them to survive while retaining their normative values and clan laws. Areas of convergence and divergence are traced to the genealogy of the clans and the effect of colonialism on the clan 'judicial' system. I conclude that despite the structural transformations, mysticism plays a significant role in sentencing, exacerbating the challenges to protection of procedural rights.

Chapter 7 presents the second part of the empirical study findings. I examine the manner in which the clan courts develop a wider construct of procedural rights to suit their communitarian setting. I also show how far international law is rationalised by clan courts in an attempt to reconcile two different paradigms. The issue investigated is whether the clan courts are able to offer better protection for procedural rights during sentencing. I find in the affirmative, but also point out instances where individual rights are abridged to cater for social responsibilities. I show how a traditional concept of precedent is used as a tool of interpretation by the clan court to reconcile traditional and national procedural approaches.

Chapter 8 shows how Uganda's state practice provides a salutary lesson for the ICC on the vexed question of accommodating traditional restorative features. Normative rigidity in legislation, retributive sentencing principles and an unimaginative application of precedent, influence this harmonisation process. This is particularly true of the Supreme Court's interpretation of Article 126 (1) that fails to relate communitarian values to procedural rights in sentencing. This deprives the ICC of relevant 'African' jurisprudence on procedural rights during sentencing. I conclude that the ICC could do better to achieve local procedural legitimacy by adopting a translation theoretical model.

The concluding chapter recapitulates the harmonisation question. Through my theoretical model I attempt to reconcile competing interests using procedural rights during sentencing. I therefore set out a framework for an expanded notion of procedural rights using an integrated participatory approach. The first part of the model shows how a traditional participatory approach can be translated into the international sentencing framework. The second part of the model applies a liberal communitarian theory by translating an expanded construct of procedural rights. The model draws on the practice of Jopadhola clan courts. Although questions still remain on the capacity of international law to bend towards and assimilate African customary law, some tentative suggestions are made here.

CHAPTER TWO: TRANSLATING AFRICAN CUSTOMARY LAW: SOME THEORETICAL CONSIDERATIONS

Section 1: Introduction

This Chapter attempts to answer the question whether the International Criminal Court's (ICC) normative sentencing framework could reconcile with the traditional one. This answer demands a critical appraisal of structural and doctrinal factors that would likely influence such reconciliation. I do this appraisal by setting out the theoretical context in which traditional and international normative frameworks operate, and how human rights sits in relation to both. I note that the ICC is based on a judge controlled procedural framework and traditional justice on a restorative participatory process, representing structurally divergent procedural paradigms. Then again, some features of the ICC like public pronouncement of sentence resonate with aspects of traditional participatory process.

Cognisant of the central argument of the thesis, I analyse why the two paradigms as they currently operate, seem not capable of administering procedural justice in an integrated system. This is because their different philosophical underpinnings mean that the notion of procedural rights is viewed differently in both. One is based on individual rights, the other on communitarian values. Moreover, procedural rights are not regarded as a normative bridge that can reconcile the two paradigms. I conclude that in order to bring these conflicting legal systems in harmony using a pluralist interpretation of rights, the consideration of competing arguments is crucial. Following this introduction, I start by appraising the theoretical perspectives of traditional restorative justice (Section 2). I then discuss the theoretical framework of the ICC sentencing procedure (Section 3). I offer a brief conclusion in Section 4.

Section 2: The Traditional Restorative justice model

In this section, I examine the structural framework and underlying values of traditional restorative justice. Through an analysis of its processes, I show that traditional justice is premised on collective decision making, restorative philosophical

underpinnings and a protection of communitarian values. The outcome is public participatory justice using a 'shared judicial approach'.

(i) Restorative participatory justice

The term 'restorative justice' has no single, clear established meaning. It is described as internally complex and open. Although it continues to develop, it remains deeply contested and is used in different ways.[1] Restorative justice has been defined by some as an attempt to view crime beyond law breaking and acknowledge the hurt to victims, the community and offenders.[2] Others state that it emphasises the repair of harm and ruptured social bonds resulting from the crime, thereby focusing on the relationships between the crime, victim, offenders and society.[3] Strong and Van Ness describe three conceptions of restorative justice: the encounter concept: a modern development where a facilitator enables the offender and victim to discuss the crime; the reparative concept: where the harm occasioned to the people and relationships must be repaired; and the transformative concept, that refers to changing the way people live and understand themselves. There is some overlap and tension between the concepts.[4]

African restorative justice reflects this overlap and tension within its framework.[5] Its premise is aptly described by Elechi as participatory justice-making, based on ancient ways of settling disputes.[6] Participatory justice-making incorporates restorative principles by creating opportunities for the 'conflict property owners': victim, offender, their kin and community, to collectively define the harm, the repair and resolution to the conflict.[7] African restorative justice is victim-centred in the sense that it enables the victim to express their hurt and loss, to understand the

[1] G. Johnstone and D. Van Ness, 'The meaning of Restorative justice' in G. Johnstone and D. Van Ness (eds.) *Handbook of Restorative Justice* (Portland, Oregon: Willan Publishing, 2007) at 6-8.
[2] N. Christie, 'Conflict as property' (Oslo: 1976) no.23 cited in O. O Elechi, *Doing Justice without the State: The Afikpo (Ehugbo) Nigeria Model* (New York &London: Routledge, 2006) 24.
[3] K. Daly and R. Immagirgeon, 'The Past, Present And Future Of Restorative Justice: Some Critical Reflections' (1998) 1 *Contemporary Justice Review* 21-45, 22.
[4] G. Johnstone and D. Van Ness *op cit.* See also R. Young and C. Hoyle for a discussion of the blend of three stages of retribution, restoration and rehabilitation in 'Restorative Justice and Punishment' in S. McConville (ed.), *The Use of Punishment* (Cullompton: Willan Publishing, 2003) 221-222.
[5] In using this term I am not of course saying that restorative justice and systems of justice are uniform in Africa, nor am I implying that there is such a thing as 'African' justice. This is a term of art that is accepted by African writers about this notion of communitarian justice based on restoring the equilibrium.
[6] O. Elechi *op cit* (2006) Chapter 2, 28 for a theoretical perspective on restorative justice.
[7] *Ibid*, 18-19.

circumstances surrounding the offence and maybe even forgive the offender.[8] The community can learn from the conflict and make changes to prevent a similar occurrence in future. Reconciliation follows, achieved through a process of harmony. Rehabilitation or healing, takes place after the offender expresses remorse, is publicly shamed and then reintegrated into society.[9] Thus, equilibrium is restored once it is understood the offender has paid their dues to the victim and community. In ancient processes, victim's dues did not need to be in tangible form and could be symbolic: a demonstration of the offender's guilt through public ridicule; harm or other punishment could be publicly imposed. Michalowski describes this as 'ritual satisfaction'.[10]

A much earlier and persuasive analysis of traditional justice was provided by the African jurist T.O Elias, on the difference between aims of the two models. Elias argued that African law tried to achieve equilibrium by repairing all breaches that disturb society. In his view, this orientation was consistent with Jeremy Bentham's utilitarian philosophy of the 'greatest happiness for the greatest number.'[11] However, Elias saw an important difference in approach, in that African law strives to reconcile disputants, whereas English law limits itself to resolving the conflict: stopping at the apportionment of blame. For that reason, to avoid feuds that may unravel social order, the ceremonial reconciliation of parties followed payment of fines. Restoration of the parties to the status quo ante was the focus of this 'judicial' process, so no property could be left with the one who did not legitimately own it.[12] I agree with Elias, and make the standard point here that highly inter-dependent societies such as the clan will tend to prefer modes of justice aimed at reconciliation rather than blame, narrow conflict resolution and punishment. Accommodating such traditional modes of justice is arguably the most appropriate procedural approach for crimes of an international nature, because it gives communities a sense of participation and ownership; and achieves procedural legitimacy based on local culture.

The main distinction between the two models, is the role (or absence) of procedural rules. In the international model, a judge adheres to strict rules of evidence

[8] D. Nsereko *op cit* (1992) 23.
[9] O. Elechi *op cit* 19, 26-29.
[10] R. Michalowski, *Order, Law and Crime* (1985) cited in Elechi *ibid*, 19.
[11] T. Elias *op cit* 268-272. He identifies a similar trend of thought in Kant's definition of law in which the arbitrary will of an individual may be combined with that of another under a broader law of freedom and Roscoe Pound's regulation of conflicting claims in an effort to realise social justice.
[12] *Ibid*, 271.

and procedure. By contrast, there is no emphasis on use of rules as a basis of resolving conflicts in the traditional model.[13] In fact, traditional procedures have been described as informal and 'flexible' because of both the absence of the burden of proof and the presence of 'irrational' modes of proof and decision making.[14] Dlamini describes how these 'flexible' yet informal rules worked. Informality was inherent in the way the litigants were allowed to present their case and adduce evidence; and also in the role of the court. When presenting a case, a litigant was given great latitude to testify and even say things that may be irrelevant but may later turn out to be important. Such a flexible process instilled confidence in all parties and witnesses about the decision, which is essential for social stability.[15] The proceedings were also in the local language.

Historically, decision making included use of 'precedent' to make oral jurisprudence. Elias suggests that precedent in pre-colonial Africa was applied more in deference to the authority of the elders and less as binding precedent.[16] This is because there was no written jurisprudence, instead the elders or old chiefs were the repositories of folk lore and oral jurisprudence.[17] This flexible character of law made it necessary for elders to refer to cases decided by themselves and their predecessors in much the same manner as modern precedent, though they did not regard themselves as under an obligation to follow precedent.[18]

The judgement and sentence, arrived at by consensus, was pronounced publicly by senior elders or a chief. Both judgement and sentence were based on prevailing norms of the society. Norms and 'folk wisdom' were reiterated in speeches by the elders or chiefs.[19] The *ratio decidendi* was always in the socio-cultural context using a pragmatic approach to justice as 'conceived and accepted in the society', of

[13] Penal Reform International, *Traditional and Informal Justice Systems and Access to Justice in Sub-Saharan Africa*, (London: Penal Reform International, 2000), Chapter 8 123-124, available at http://www.gsdrc.org/docs/open/SSAJ4.pdf visited on 27/04/2007.
[14] J. Van Velsen, 'Procedural Information, Reconciliation and False Comparisons' in M. Gluckman (ed.) *Ideas and procedures in African Customary Law* (Oxford: Oxford University Press, 1969) 139-143 and 22-37- introduction.
[15] C. R. M Dlamini, 'The role of customary Law in meeting social needs' (1991) *Acta Juridica* 71-85, 83-34.
[16] T. Elias *op cit* 257-8.
[17] The elders are repositories of tradition and moral beliefs that contribute to unification of the community: P. Ikuenobe, 'Moral Education and Moral Reasoning in Traditional African Cultures' (1998) 32 (1) *Journal of Value Inquiry* 25-42, 28.
[18] T. Elias *op cit* 256-258.
[19] *Ibid*, 249, 271-272.

which the judges were a part.[20] Clearly then, this form of justice in traditional societies did not depend on the state, but on the social structures within the community.

Accordingly, traditional restorative justice reflects a conflation of reparative and transformative concepts applied through collective decision making. As this thesis will demonstrate, these traditional modes of decision making still apply in contemporary Africa. Though traditional restorative justice is mooted as non-adversarial, its philosophical underpinnings overlap somewhat with retributive aims. I explore this in the next sub section.

(ii)Restorative Philosophical underpinnings

Concepts of reparation and transformation are strong within traditional restorative justice, based on what Elechi calls an 'African philosophy of justice.'[21] Here, I discuss only those philosophical issues that are relevant to the outstanding problems identified earlier,[22] which relate to the international sentencing process. In this respect, three philosophical concepts are important: African religion, spiritualism and communal values.[23]

African religions are central to people's lives, with each community having its own system of beliefs and practices manifested in every day activities, including the social and political.[24] Culture is synonymous with religion and the line between the spiritual and sacred is thin. Consequently, belief in mystical power expressed through magic that could be used for good or evil, is an intrinsic part of African religion.[25] Historically, traditional law was used to punish crimes that were anti social-those involving the illegitimate use of magic and supernatural forces like witchcraft.[26] This is because it was believed that witchcraft destroyed the fabric of society by creating disharmony and fear. Since its operations use magic, it was felt that witchcraft could

[20] *Ibid*, 259.
[21] O. Elechi *op cit* 30-36.
[22] Firstly, traditional communities view mysticism as part of the sentencing process. Secondly, international procedural regimes may fail to gain acceptance at the domestic level if they neglect issues of the supernatural and rituals that are part of the traditional sentencing process: Ch. 1 S. 1*op cit*.
[23] O. Elechi *op cit* gives an excellent review of these philosophies at 30-36.
[24] J. Mbiti, *African Religions and Philosophy* (London: Heinemann Educational books Ltd, 1970) at 9. O. Elechi *ibid* 30-31.
[25] O. Elechi *ibid*, at 31-32 citing Gyekeye, 1996 at 4.
[26] J. Driberg (1928) (1934) *op cit* and F. Burke *op cit* 64.

not be punishable by compensation like with ordinary offences. Therefore an extreme punishment like death was meted out on the offender.[27] Hence, retributive underpinnings buttressed with supernatural beliefs, underpinned some traditional punishments. For instance, Driberg's account of West Africa secret societies like the Komo and the Poro, shows that punishments involved spiritual sanctions and reflected punitive justice.[28]

On spiritualism, Gluckman underscores the role of ritual beliefs and practices in determining legal responsibility.[29] Compensation or reparation was only complete after sacrifice followed by a 'ceremonial purge', without which both offender and his community were in danger of spiritual retribution.[30] This ritual was regarded as inseparable from restitution because 'reparation satisfies the living but without sacrifice and oblation the wrath of the gods is not appeased.'[31] The community included the dead called 'ancestors' or gods, and the unborn children, all of whom in one way or another are related to the 'world of nature.'[32]

Communal values accord to the philosophy that community interests supersede that of the individual. In this respect, an individual must consider the consequences of his or her action on the community at large. Gyeke identifies ethical communal values as including: sharing, interdependence, reciprocal obligation and social harmony.[33] Reciprocal obligation imposes responsibilities on the individual. Where an individual fails to show sensitivity towards such responsibilities, the community may take steps to protect its integrity and in so doing, may abridge the individual's rights.[34] Equally, the community may take responsibility for its member's wrong doing by paying the reparation. This situation arises in societies holding beliefs that if a serious crime is committed by an individual, ill luck will befall the whole community. As my empirical study shall show, these aspects of African philosophy of justice still hold today. Against this backdrop, I now discuss the notion of 'rights' that underpin traditional participatory restorative justice.

[27] J. Driberg (1934) *ibid* 236.
[28] *Ibid*, 237-238, note 1.
[29] M. Gluckman, (ed.), *Ideas and procedures in African Customary Law* (Oxford: Oxford University Press, 1969) 22-37.
[30] J. Driberg (1934) *op cit* 328. To that end there is no statute of limitations.
[31] J. Driberg *op cit* (1928) 69-70.
[32] J. Mbiti *op cit* 70-73, O. Elechi *op cit* 34.
[33] K. Gyekye, *African Cultural Values: An Introduction*, (Accra: Sankofa Publishing Co, 1996) 35; (1997) *op cit* 67.
[34] *Ibid* (1997) 65-66.

(iii) Communitarian values

Restorative justice is sometimes defined by exploring the rights of the victim. The rights of society are satisfied, some contend, when the rights of individual victims within it are vindicated through restitution'.[35] Others argue that some individual rights exist alongside this, for instance, that there is a victim's right to an effective remedy, because the compensation is dealt with in the same forum. Thus, there is no need for the victim to bring civil proceedings.[36]

I instead refer to 'rights' of a communitarian nature that underpin the traditional participatory decision-making process as communitarian values. Based on communal values identified above by Gyeke, these 'rights' comprise duty to kin, restitution, reconciliation and the role of ritual. The philosophical foundations for this notion of human rights is found in the African variant of humanism called *Ubuntu*[37] that finds expression in the principle of reconciliation and group rights.

Reconciliation restores societal equilibrium through principles similar to the rules of natural justice. Here, the traditional court system functioned within a framework of law, religion, kinship and culture.[38] Group rights according to M`baye, applied to societies where individuals were users of collective rights by virtue of belonging to a clan, family or ethnic group.[39] The principles of group rights encompassed firstly, procedural rights, where all parties were given an opportunity to state their case under the equivalent of rules of natural justice. Secondly, the proceedings were open to the general public. Finally, because traditional proceedings were not a product of jurists, there was no legal representation.[40] Elechi also observes

[35] D. Van Ness and H. Strong, *Restoring Justice* (Cincinnati, Ohio: Anderson Publishing Company, Cincinnati: Ohio, 1997)19.
[36] O. Elechi *op cit* 66.
[37] R. B Mqeke, 'Customary law and Human Rights' (1996) 113 (2) *South African Law Journal* 364-369. Ubuntu was defined by Justice Mokgoro in *S v Makwanyane* [1995] 3 SA 391 at 308 as 'humaneness'. It is derived from the expression 'umuntu ngumuntu ngabantu' [a person is a person because of other people/ a person can only be a person through others]: A. M Anderson, *Restorative Justice, the African philosophy of Ubuntu and the Diversion of Criminal prosecution* at 9. For Anderson, *Ubuntu* is a crucial factor in the shaping of perceptions that influence social conduct, for instance in the decision making reached by consensus: 10- available at http://www.isrcl.org/Papers/Anderson.pdf, visited on 14/10/08.
[38] R. Mqeke *op cit* at 365, citing M. Gluckman, 'Natural Justice in Africa' (1964) 9 *Natural Law Forum* 22-44.
[39] *Ibid* at 365 citing K. M`baye 'The African Concept of Law' in R. David (ed.), *International Encyclopaedia of Comparative Law* Vol. II Chapter 1 (1975), para 225 page 138 and para 257 page 148.
[40] *Ibid*, 366 – 367 citing examples from Cape Nguni group in South Africa.

that the African system was democratic, allowing participation of adults in decision making so that everyone had a right to express their mind on public questions.[41] All these principles apply in contemporary clan courts. In summary, in human rights parlance, communitarian values integrate aspects of rights to a public hearing, oral expression and the right to be heard; alongside reconciliation, restitution, duty to kin and role of ritual.

When juxtaposed against individual rights, we see that the notion of procedural rights is viewed differently from the international procedural paradigm. Bennet sets out the points of conflict between the two philosophies: individual rights versus community values, rights versus duties; principle of patriarchy versus freedom of thought or speech.[42] This is a precise statement of the normative divergence between the two concepts of rights.

Some argue that the African concept of human rights is the superior one. They reject the primacy of international human rights, insisting that Africa cannot implement human rights instruments conceived and drafted in a western individualised context, incapable of being applied in a communitarian setting.[43] The real problem from a liberal perspective is that individuals cannot be protected from violations due to the absence of negative rights. Some like Seidman see no place for African customary law regarding it as incongruent with human rights notions.[44] The rejection of customary law by scholars like Seidman seems to be linked to the failure of customary laws to adopt the individualist approach to human rights. Also scholars of the liberal tradition like Gerwith emphasise the main principles of human rights as autonomy, equality and protection of these values for the individual.[45] This emphasis on the individual exclusively, runs contrary to communitarian values and excludes the community as rights holders and party to a criminal case. This is because an individual is part of an extended family that forms a clan. The clan collectively

[41] O. Elechi *op cit* 66-67 referring also to Sithole as cited in K Gyeke (1996) 153.
[42] T. W Bennet, 'The Compatibility of African Customary Law and Human Rights' (1991) *Acta Juridica* 18-35 at 23 citing works by Donnelley (1982), Howard (1986), Mbaye (1982) and Mojweku (1982): notes 40-43. Also J. B Ojwang, 'Laying a Basis for Rights: Towards a Jurisprudence of Development' in G. R Woodman and A. O Obilade (eds.), *African Law and Legal Theory* (Aldershot: Dartmouth, 1995) 369.
[43] These authors are listed by R. E. Howard, 'Group versus individual identity in the African Debate on Human Rights' in A. An_Naim and F. Deng (eds.), *Human Rights in Africa: Cross cultural perspectives* (Washington, D.C: The Brookings Institution 1990), note 2 at 159. The list includes among others J. Cobbah, J. Ki Zerbo and C. C. Mojekwu.
[44] R. Seidman, 'Law and Economic Development' (1996) 999 *Wisconsin Law Review*, at 1027, 1029.
[45] A. Gerwith *op cit* 5, 27-30, Ch.1 61-63. However the language of his work is in universal terms.

protects its interests, so rights of an individual must be balanced always against interests of the group.[46] Accordingly, although traditional law protects individuals, they appear to have no negative rights under it as a member of the community.[47]

Other authors, however, argue that communitarian rights do not go against the ethic of individual rights so as to deny individual autonomy and equality. For instance, philosophers like Murungi argue that communal 'rights' are human rights but with no hierarchical superiority over individual rights and they implicate each other but are not mutually exclusive.[48] I find Mirungi's arguments valid. Although they do not address the legal challenge of bridging the two opposing normative frameworks, such views do affirm the fact that communitarian values have a place for individual rights.

There are concerns that traditional systems based on restorative justice, neglect procedural protection especially for suspects. Some argue that traditional systems may view procedural safeguards as a stumbling block to restorative outcomes.[49] Additionally, restorative justice presumes a voluntary waiver of rights, namely the presumption of innocence and the right to remain silent. This is because the starting point is that the offender must acknowledge responsibility. Another weakness is the non existence of the right to legal representation.[50] However, once we acknowledge the 'punitive bite' of restorative justice we see the need for procedural safeguards[51] to ensure fair sentencing outcomes.

Another area of concern is the patriarchal nature of African society, meaning the traditional justice system is sometimes prejudicial to women and children. Patriarchy undermines the right to equality before the law because of the power imbalance in society.[52] Zedner argues convincingly, that though reparation and

[46] N. Sudarkasa, 'African and Afro-American Family Structure' in J. B Cole, *Anthropology for the Nineties: Introductory Readings* (revised edition) (New York: The Free Press, 1988) at 197. Also N. Sudarkasa (1980) *op cit* 44 discussed in Ch. 1S. 4 *op cit.*

[47] H. P Glenn, *Legal Traditions of the World: Sustainable diversity in Law,* 2nd Ed, (Oxford: Oxford University Press, 2004) 72. In his definition, chthonic people are traditionalists who live in harmony with the earth. Africans, who practice traditional modes of justice, arguably fall in this category.

[48] J. Murungi, 'The Question Of An African Jurisprudence: Some Hermeneutic Reflections' in K. Wiredu (ed.), *A Companion To African Philosophy,* (Oxford: Blackwell Publishing Limited, 2004) 524.

[49] A. Skelton and M. Sekhonyane, 'Human Rights and Restorative Justice' in G. Johnstone and D. Van Ness (eds.), (2007) *op cit* 581 citing G. Johnstone, *Restorative Justice: Ideas, Values, Debates* (2002).

[50] *Ibid*, 583.

[51] R. Young and C. Hoyle *op cit* 226.

[52]B. Tshehla, *Traditional Justice in Practice: A Limpopo Case study* (Pretoria: Institute for Security Studies, 2005) Chapter 3 discusses these outcomes of a male-only court hearing cases involving women victims. S. Razack, 'What Is to Be Gained by Looking White People in the Eye: Culture, Race

retribution are both predicated on individual autonomy, they ignore effects of power, social control and inequality within communities.[53] There are equally valid concerns about coercion on consent to participate because of power relations.[54] For instance, among Bantu groups in Rwanda or Burundi, there is evidence of male domination of the public participatory decision making process. In the Rwandese Gacaca courts, elderly men participated in and presided over these courts usually to the total exclusion of active participation of women and children.[55] In Burundi, to become a *Umishigantahe* and therefore sit on the *Bashingantahe* (court) one had to be a married man, undergo training, a rite of passage and receive the *Intahe* (sacred wooden stick symbolising the rule of fairness).[56] These examples underscore the social construction of roles in traditional restorative justice, revealing scant evidence of equality before the law, much less of equal participation.

In summary, the process by which the community participates in restorative justice is through communal values like reciprocal obligation toward each other (duty of kin), buttressed by religious and spiritual beliefs; but with elements of retributive justice. Though communitarianism has a place for individual rights, due to power inequality there are concerns about neglect of individual procedural safeguards. Accordingly, the international model will remain incompatible with traditional restorative justice for as long as their sentencing frameworks are based on these normatively divergent premises. Let us now investigate to what extent traditional participatory restorative justice may be accommodated at the international level.

Section 3: Locating Participatory Restorative justice in the ICC procedural model

This section examines the procedural mechanisms of the ICC to assess the extent to which its sentencing framework could accommodate traditional restorative features. Through a legal analysis, I show that the ICC is premised on the dominance

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and Gender in Cases of Sexual Violence' (1994) 19 *Signs: Feminism and the Law* 894-923: 906-910 and T. W Bennet, *Human Rights and African Customary Law* (Cape Town: Juta, 1999).

[53] L. Zedner 'Reparation and Retribution: Are They Reconcilable?' (1994) 57 (2) *Modern Law Review* 228-250, 228, 248-249.

[54] A. Skelton and M. Sekhonyane *op cit* 585 citing H. Zehr, *Changing Lenses: A New Focus for Crime and Justice* (1990).

[55] Goldstein –Bolocan, 'Rwandan Gacaca: An Experiment in Transitional Justice' (2004) *Journal of Dispute Resolution* 355 cited in K. P Apuuli, Unpublished Thesis (2006) *op cit* at 152 and Chapter 6 in which he gives a historical account of the pre-colonial institutional set up of the Gacaca.

[56] T. Nahimana, 'The Burundi *Bashingantahe* Institution' (2002) 8 (1) *EAJPHR* 111-120, 114-115.

of the inquisitorial-adversarial prosecutorial model, largely retributive philosophical underpinnings and protection of individual human rights during the trial. I start with a brief overview of the theoretical context in which the Rome Statute and its procedure is grounded.

(i) Theoretical basis – a sketch

The theoretical basis and justification of international criminal law, is in paragraph 3 of the Preamble to the Rome Statute that recognises that grave crimes 'threaten peace, security and wellbeing of the world.'[57] This paragraph sets out the nature of legal values to be protected by the community of nations that are parties to the ICC.[58] These values include protection of individuals by punishing perpetrators of war crimes and breaches of the Geneva Conventions against civilians. International criminal law protects these legal values that belong primarily to the national legal order, by giving additional protection to human rights provisions.[59] For that reason, international criminal law compensates for deficiencies in national criminal justice. Besides, international criminal jurisdiction is applied *only* where national jurisdictions cannot guarantee independent and adequate prosecution [and sentencing] of crimes under international law. This principle of complementarity applies to diminish tension between these two jurisdictions.[60]

(ii) The sentencing framework

The Rome Statute sets up the structure of the ICC and the basis for its procedure but does not create substantive law.[61] The sentencing procedure is set out overleaf:

[57] Rome Statute of the International Criminal Court A/CONF.183/9 of 17 July 1998.
[58] O. Triffterer, 'Preamble' in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article,*(*Baden-Baden*: Nomos Verl. Ges, 1999) para 9-10, page 9.
[59] *Ibid*, paras 20-24, pages 26-28.
[60] *Ibid,* paras 50-52, pages 36-37. Rome statute *op cit* paragraph 5, the Preamble and Article 17. R. Cryer, H. Friman, D. Robinson and E. Wilmshurst, *An Introduction to International Criminal Law and Procedure* (New York, Cambridge University Press, 2007) give a comprehensive account of the principle of complementarity on how it supplements, not supplants national judicial systems: 127-147.
[61] O. Triffterer *op cit* para 60, page 40. The procedural rules are in the Rules of Procedure and Evidence of the International Criminal Court (2000).

Article 76:

> 1. 'In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.
> 2. Except where article 65 applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence.
> 3. Where paragraph 2 applies, any representations under article 75 shall be heard during the further hearing referred to in paragraph 2 and, if necessary, during any additional hearing.
> 4. The sentence shall be pronounced in public and, wherever possible in the presence of the accused.'

Some distinct features in Article 76 demonstrate the limits and opportunities of the ICC in accommodating a traditional participatory restorative process. Limits are apparent, firstly in Article 76 (1) where judicial discretion in considering the appropriate sentence is solely for the Trial Chamber. Article 76 (1) read together with Articles 74(4) and 78(1) demonstrate the extent of judicial discretion. Article 74 (4) as expounded in Rule 142 (1) provides that following the closing statements, the Trial Chamber retires to deliberate *in camera* (in secret) before notifying parties of the date on which the decision will be pronounced. Article 78 (1) provides that in determining the sentence, the Trial Chamber will consider relevant factors listed in Rule 145, like impact of the crime on the victim and their families, or attempts by the defendant to compensate the victims.[62] Secondly, the Trial Chamber has the discretion to decide whether to hold a separate sentencing hearing under Article 76 (2) and (3) for any additional evidence, submissions or a hearing on reparations.

Opportunities may be found in Article 76(3) and (Rule 143), under which a hearing on reparations may be held. Read together with Article 75 (3) and Rule 97(2), the Trial Chamber under Article 76(3) may at its discretion invite representations from convicted offenders, victims, interested persons and state representatives. Furthermore, under Article 76 (4) the sentencing decision must be pronounced in public and where possible, in the presence of the accused. Under Rule 144 (1), this means that *all* decisions of the Trial Chamber including sentencing decisions shall be pronounced in public in the presence of the offender, the Prosecutor, victims or their legal representatives, and state representatives.

[62] On appeal, the Appeals Chamber in Article 81 (2) (a) Rome Statute *op cit* may vary a disproportionate sentence, or revise a sentence where new evidence is available under Article 84 (1).

Collectively, these distinct features reveal a fundamental structural difference from the traditional restorative model discussed in the preceding section. This is the centralisation of sentencing powers in the judges - not a single article on sentencing lacks judicial oversight. Hence, sole judicial discretion in sentencing marks the point at which international and traditional frameworks contrast sharply. This structural difference arises from three theoretical premises on which the ICC procedural framework is built: dominant adversarial-inquisitorial procedural model; retributive philosophical underpinnings and a normative framework based on the protection of individual human rights. I will discuss each in turn.

(iii) Adversarial-inquisitorial procedural model

The ICC was created by treaty - the Rome Statute - that established it as a permanent international criminal court to try war crimes.[63] The ICC developed after the World War II trials, following intense protracted negotiations between states.[64] Safferling notes that apart from a vague framework, the Rome Statute does not provide much guidance on sentencing procedure.[65] This may be because the ICC 'hybrid' procedural model is a conflation of two major legal traditions of common law and civil law. Parts of the trial such as the pre-trial phase (Articles 56-58) lean towards the inquisitorial model by giving the judges powers to conduct an inquiry. Overall though, the trial procedure leans more towards the common law dispute approach.[66] This bias towards common law is to protect procedural equality of arms during the trial, a feature of the adversarial model.[67]

[63] Rome Statute adopted by the Assembly of State Parties at New York, 3-10 September 2002 ICC-ASP/1/3 and came into force on 1st July 2002. A comprehensive account of the evolution of the Rome Statute is given by M. C Bassiouni *Introduction to International Criminal Law* (Ardsley, N.Y: Transnational, 2003) 444-489.

[64] Ch. 1 S. 2 (1) *op cit* and D. McGoldrick *op cit* 13-14.

[65] C. Safferling *op cit* 314-318.

[66] A. Orie, 'Accusatorial v. Inquisitorial approach in International Criminal Proceedings prior to the Establishment of the ICC' in A. Cassese, P. Gaeta and J. Jones (eds.) *The Rome Statute of the International Criminal Court- A Commentary Vol. II* (Oxford: OUP, 2002) accent the inroads were made by the civil law in the pre-trial stage: 1439-1495; A. Cassese, *International Criminal Law* 2nd ed. (New York: Oxford University Press, 2008) 370,373-374; G. K Sluiter, 'The Law Of International Criminal Procedural And Domestic War Crimes Trials' (2006) 6 (4) *International Criminal Law Review* 605-635, 610-611; G. MacCarrick, 'The Right To A Fair Trial In International Criminal Law (Rules Of Procedure And Evidence In Transition From Nuremberg To East Timor)' 13-20 at www.islcl.org/Papers/2005/Maccarrick.pdf visited on 20/06/2008; K. Ambos, 'International Criminal Procedure: "Adversarial" "Inquisitorial" or mixed?' (2003) 3 *International Criminal Law Review* 1-37, 19-20 underscores the dominant role of the Trial Chamber, and G. K McDonald and O. S Goldman

The common law system is based on an adversarial prosecutorial model conducted as a dispute that engages two adversaries before a dispassionate decision maker (judge), who reaches a verdict.[68] The state appropriates the conflict from the parties, so the prosecutor represents the state's interests. The model is based on presumption of innocence and equality of arms between the prosecutor and the defendant.[69] Throughout the trial the defendant must be protected from the state by a shield of rights whose breach is severely punished.[70]

The Inquisitorial model (civil law) is structured as an official inquiry in which a dossier is prepared by the prosecutor who gathers evidence with the help of the police. The accused is indicted and the evidence is presented to court.[71] The judge plays a dominant role in conducting this criminal inquiry,[72] by examining witnesses to find the truth and supplementing the information in the dossier where necessary. Unlike in the adversarial trial, the truth is sought actively by the judge. Since the state is meant to be theoretically neutral in the investigation and trial, there is assumed to be little need for defence attorney or live testimony. At the end of the trial, the prosecutor submits his or her views on the evidence, the guilt of the defendant and the proposed sentence. Determination of guilt and sentence is by the judge without any input from the ordinary citizens or defence lawyer.[73]

The sentencing phase in international criminal courts is the phase during which common law and civil law principles strongly conflict each other.[74] In the inquisitorial model, there is one act of conviction and sentencing where the judgement contains both a finding of guilt and sentence. In the adversarial model are two acts: the first is the making of a finding that is delivered in a verdict. The second act is the determination of sentence following consideration of pre-sentence reports.[75]

Vol. I op cit 479-545, 556: shows that the ICC has elements of both the adversarial and inquisitorial models.

[67] C. Safferling *op cit* 268.

[68] M. Damaska, *The Faces Of Justice And State Authority: A Comparative Approach To The Legal Process* (New Haven: Yale University Press, 1986) 3. Also M. Damaska, 'Structures of Authority and Comparative Criminal Procedure' (1975) 84 (3) *Yale Law Journal* 480-544, 541-543.

[69] C. Safferling *op cit*, 221, 265.

[70] R. Volger, *A World View of Criminal Justice* (Aldershot: Ashgate, 2005) 130.

[71] C. Safferling *op cit* 222.

[72] M. Damaska, (1986) *op cit* 3 and M. Damaska, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' (1973) 121 *University of Pennsylvania Law Review* 506-589, 517, 555-560.

[73] C. Safferling *op cit* 223 and C. M Bradley, 'Overview' in C. M Bradley (ed.), *Criminal Procedure: A World wide Study*, (Durham: Carolina Academic Press, 1999) xv, xvi.

[74] C. Safferling *ibid* 371.

[75] M. Findlay and R. Henham (2005) *op cit* 183 -185.

Thus, there is a clear separation of the finding of guilt from the passing of sentence. This separation occurred because the finding of guilt was originally considered by the jury and then the judge would determine the punishment.[76] However, the ICC model is a hybrid, so it has the option of a separate sentencing hearing.[77] Crucially, the sentencing inquiry is underpinned by wide judicial discretion similar to that in the common law tradition.[78]

This wide judicial discretion can be traced to the Nuremberg Charter.[79] Under Article 27, sentencing was at the discretion of the Tribunal and there were no sentencing hearings. The Nuremberg and Tokyo Tribunals appeared to have a wider degree of discretion in determining the penalty than the ICC.[80] The Nuremberg Charter in Article 26, provided that the Tribunal would give reasons on which the judgment was based, that the judgment was final and not subject to review. Crucially, even where the judges disagreed on the culpability of the offenders or the quantum of sentence, these deliberations were done behind closed doors to preserve unanimity. Sentences could be varied by the Control Council but there was no appeal against conviction or sentence.[81] This implies that decision making was left to the judges and was arguably, not participatory.

The main model for the ICC Rules of Procedure and Evidence (RPE) is the judge-made RPE, drawn from the ad hoc International Criminal Tribunal for Yugoslavia (ICTY)[82] and adopted wholesale by the ad hoc International Criminal Tribunal for Rwanda (ICTR).[83] The ICC RPE differs from that of the ad hoc tribunals, firstly because the ICC under Article 51 (1) leaves control of the rule

[76] C. Safferling *op cit*, 269.
[77] R. Henham (2004) *op cit* 187-188. He cites scholars like Zappala who argue that the ICC model is unclear on whether there should be one decision or two, with a separate verdict and sentence.
[78] M. Bagaric and J. Morss, 'International Sentencing Law: In search of a Justification and Coherent Framework' (2006) 6 (2) *International Criminal Law Review* 191-255, 205-207.
[79] Nuremberg Charter adopted 29 October 1945; reproduced in V. Morris and M. P Scharf, *An Insider's guide to the International Criminal Tribunal for the former Yugoslavia*, Vol. 2 (Irving-on Hudson, New York: Transnational Publishers, 1995) 687-691.
[80] R. E Fife, 'Part 7 on Penalties' in O. Triffterer (ed.) (1999) *op cit* 987-988. Penalties ranged from the death penalty, life imprisonment, and imprisonment to deprivation of property: note 11.
[81] D. V Zyl Smit, 'Punishment and Human Rights in International Criminal Justice' (2002) 2 (1) *Human Rights Law Review* 1-17 at 2 and D. McGoldrick *op cit* 18. Of the 19 convicted, 12 were sentenced to death, 3 were sentenced to life imprisonment and 4 to terms of imprisonment ranging from 10-20 years. The Tokyo Tribunal held in Japan has not been much publicised because it followed Nuremberg's path and was seen as less legitimate: L. Sadat, *The ICC and the Transformation of International Law* (Ardsley, New York: Transnational, 2002) 2.
[82] UN Doc. IT/32/Rev.39 adopted on the 11th February 1994, details in Chapter 4, *infra*.
[83] UN Doc. IT/32/Rev.1 (1995) adopted on the 29th June 1995, details in Chapter 4, *infra*.

making process in the hands of states.[84] After the member states have adopted the rules, they become binding on the judges. This arose from the many changes made to the RPE of the ICTY and ICTR by the judges, giving rise for concern among state parties.[85] Secondly, the ad hoc tribunals have applied their rules in practice, thus enabling (in their case) a more detailed assessment of which model (adversarial or inquisitorial) is to be preferred at the international level.[86]

The dominance of the adversarial-inquisitorial procedural model in international law can be explained as follows. Deciding on the procedural rules that regulate trial process is influenced by what courts believe to be the 'proper' procedure for legal adjudication. Such beliefs are culturally determined with each legal system setting out its own set of normative standards to regulate the trial.[87] G. Nice suggests that those in positions of power may want to have their national law dominate international courts perhaps for fear that if it did not, then some another system could do so for reasons that are 'equally nationalistic'.[88] Such dominance of the common law-civil law legal traditions affects the legitimacy of international criminal procedure in the local context. This dominance, depicted in wide judicial discretion in sentencing, is best understood through an examination of the negotiating history of the Rome Statute.[89]

-Negotiating history

The import of decisions taken during the preparatory process was that the Rome Statute must contain principles and rules that would ensure the highest standards of justice and due process. The task was left to the Preparatory Commission with the ILC Draft Statute (1994) as the basis of discussion. Still, difficulties emerged as

[84] M. C Bassiouni (ed.), *International Criminal Court: Compilation of UN Documents and Draft ICC Statute before the Diplomatic Conference* (Rome: No Peace without Justice, 1998) at 29.
[85] D. McGoldrick *op cit* 44. Also D. Hunt, 'The International Criminal Court: High Hopes, 'Creative Ambiguity' And an Unfortunate Mistrust in International Judges' (2004) 2 (1) *Journal of International Criminal Justice* 56-70 contends that such drafting of the procedural rules hinders judicial flexibility: 62-63.
[86] K. Ambos *op cit* 1-2.
[87] G. MacCarrick *op cit* 13.
[88] G. Nice, 'Trials of Imperfection' (2001) 14 (2) *Leiden Journal of International Law* 383-397, 396. Nice refers to this normative domination as 'cultural imperialism' that is expressed sometimes through the imposition of the English language in trials: 386-387.
[89] As R. Cryer et al *op cit* at 123 point out, the absence of travaux preparatoires for the Rome Statute arose because of the informal preparatory meetings held sometimes in different countries. What exist are the accounts of those involved in the drafting and negotiation process on which I rely in this thesis.

delegates tried to include major criminal justice systems and considerable efforts were spent trying to reconcile common and civil law positions. France, for instance, prepared an alternative draft Statute that made discussions difficult as it was based solely on civil law.[90] The Working Group on Procedural Matters nonetheless, consolidated proposals from different states in devising the present provisions on sentencing.

The upshot of these negotiations was that less attention was paid to the place of public engagement in decision making within the ICC sentencing framework. Rather, the focus during negotiations was on the question of capital punishment, omitting even setting objectives and standards for sentencing.[91] Accordingly, the adaptation of Article 76 was perfunctory as the Preparatory Committee (Prep Com) dealt with it cursorily in 1996. Article 76 was not addressed by any of the Working Groups and was adopted in the Rome Statute intact.[92] For example, Article 76 (1) derived from Article 46 (1) of the ILC Draft Statute:

> '(…) in the event of a conviction, the Trial Chamber shall hold a further hearing to hear any evidence relevant to sentence, to allow the Prosecutor and the defence to make submissions and to consider the appropriate sentence to be imposed.' [93]

This wording was slightly modified in the final Article 76(1). The import is that determination of the appropriate sentence was left to the sole discretion of the Trial Chamber. Article 76 (2) also introduced the common law principle of a distinct sentencing hearing that may be held at the request of either party, or at the instance of the Chamber. [94]

In a related context, the drafting in Article 74(4) on secrecy of deliberations predates World War II where under Article 41 of the 1926 Bellot draft, the

[90] S. A. F de Gurmendi, 'Part 1: The Process of Negotiations' Chapter 8 in R. S Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations and Results*, (The Hague, London, Boston: Kluwer International, 2002) 221-223.

[91] R. Henham, 'Some Issues for Sentencing in the International Criminal Court' (2003) 52 (1) *International and Comparative Law Quarterly* 81-114, 85. Also C. K. Hall, 'The Fifth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court' (1998) 92 (2) *American Journal of International Law* 331-339.

[92] W. A Schabas, 'Article 76- Sentencing' in O. Triffterer (ed.) (1999) *op cit* 979 commenting on the Report of the Preparatory Committee on the Establishment of an International Criminal Court UNGAOR 51st Sess., Supp No. 10 UN Doc. A/51/10, Vol. I, p. 46 and Vol. II p. 226; also Report of the Working Group on Procedural Matters, U.N Doc. A/CONF.183/C.1/WGPM/L.2/Add.2 (4 July) p. 5.

[93] *Report of the International Law Commission* (1994), Commentary on Article 46 *op cit* para.1 at 123.

[94] It has been noted that the section envisages a two stage approach, even if this is not made explicit: W. Schabas in O. Triffterer (ed.) *op cit*, para 3, p. 980.

deliberations: 'shall take place in private and remain secret'. There appears to have been no debate on this provision. Apart from removing the words 'shall take place in private', Article 74 (4) remains substantially the same as the 1926 Bellot draft. The drafters also intended that deliberations (including sentence) remain informal, but the judges must be present and take part in the decisive part of the deliberations and voting.[95] Secrecy means the confidentiality of all arguments expressed during deliberations by judges, unless they agree to include the arguments in the reasoned judgement.[96] The outcome is that from a traditional perspective, Article 76 is a product of common law principles that focus on a dispute between the two parties *only* with judges as sole arbitrators.

That is not to say there was no consideration of sentencing aspects that are 'African'. The sentencing hearing under Article 76 (3) may potentially become a 'reparations hearing'.[97] As such, the court may invite representations from or on behalf of the convicted person, victims and other interested persons or states under Article 75 (3). During the deliberations, one of the contentious issues was whether the court should make a decision on the *locus standi* of persons other than direct victims to pursue claims for reparations.[98] The Report of the Working Group on Procedural Matters noted that *locus standi* under Article 75 (3) could include the victim's family and successors as well as the victim.[99] To Donat-Cattin, interested persons also include *bona fide* third parties, like owners of property formerly belonging to victims and the convicted person. He infers this from a combined reading of Article 75 (3) and Article 76(3),[100] to which I subscribe. The provisions appear to incorporate the traditional notion of participatory decision making, but on closer scrutiny this is not so. Participation under Article 75 (3) was intended to be at the discretion of the court. The use of the words 'court may invite' means that the court's discretion reduces the victim's intervention to a 'mere faculty' to make representations at the invitation of the court.[101] More so, discussions by the Prep Com show that the drafters intended

[95] O. Triffterer, 'Requirements for the decision' in O. Triffterer (ed.) (1999) *op cit* para 1 pp. 953-4 n 1, para 10 at 958.
[96] *Ibid*, 963.
[97] D. Donat-Cattin, 'Article 75: Reparation to Victims' in O. Triffterer (ed.) (1999) *op cit* para 19 page 974.
[98] C. Muttukumaru, 'Part V: Reparation to Victims', Chapter 8 in R. S. Lee (ed.) *op cit* (2002) 263-264.
[99] A/CONF.183/C.1/WGPM/1.2/Add.7,13 July 1998.
[100] Donnat-Cattin *op cit*, para 19 page 974.
[101] ICC Draft Statute *op cit* margin No. 38 et seq ; Cattin, *ibid*, para 18, page 973.

victims to participate only in the 'open' procedures of the Court.[102] This arguably underscores wide judicial control over the sentencing phase where the deliberation of sentence is done by the Trial Chamber *in camera*.

The procedure for obtaining remedies under Article 75 was not intended to replicate the traditional system where reparation is 'automatic'. In fact, the negotiations on Article 75 were largely driven by France and the United Kingdom (UK).[103] France's draft for example, was based on individual victims being able to rely on the ICC judgements to pursue civil remedies of restitution, compensation and rehabilitation in their nation courts under national law. [104] In the final text of Article 75 (1) (2) (and Rule 97), the determination of the award remained in the hands of the court. In sum, Article 75 applies common law and civil law principles, where the victim's right to remedy must be applied for in a court of law, unlike traditional restorative justice where it is dealt with in the same forum.

Another 'African' feature is the public pronouncement of sentence under Article 76(4). The ILC Draft Statute contained no references to this, but the first proposals emerged during the 1996 sessions of the Prep Com. The Working Group on Procedural Matters later adopted the final text that intended that the accused be present during pronouncement of sentence.[105] Read jointly with Article 74(5), the mode of delivery is in open court and reasons for every part of the decision or summary must be given. The origin of Article 74(5) is the 1926 Bello draft, in which a well reasoned judgement had to be read in open court. This provision was later modified and put in the Rome Statute.[106] In sum, the text of Articles 76(4) and 74(5) bears some similarity to traditional process discussed above in Section 2, where judgement and sentence are pronounced in public and reasons given for the decision.

To conclude, preoccupation with reconciling common law and civil law positions, left little room for accommodating non state adjudication systems. Giving judges sole discretion over the sentencing phase, including determination of sentence

[102] *Ibid*, para 23, p. 880. ICC Draft Statute *op cit* note 16.
[103] France and the UK's consolidated text of Article 75 were very influential: A/AC.249/1998/WG.4/DP.19. Democratic Republic of Congo was one of the African states on record to have submitted a textual proposal for the amendment of the article on reparations: U.N Doc. A/AC.249/1998/WG.4/DP.38 (27 March 1998). Other countries like Denmark, Sweden and Norway also put forth suggestions for reparation: C. K Hall *op cit*, at 338.
[104] C. Muttukumaru *op cit* 265-266, 270.
[105] W. A Schabas, 'Sentencing' in O. Triffterer (ed.) (1999) *op cit* at para 11 page 983.
[106] O. Triffterer, 'Requirements for decision' in O. Triffterer *ibid* paras 1-5 pp. 954-956.

therefore has broader implications in the context of participatory restorative justice. I now turn to the second premise on which the sentencing procedure is grounded.

(iv) Retributive philosophical foundations

The philosophical foundations of the sentencing framework in the Rome Statute are difficult to discern in the absence of any provision setting out the purposes and principles that ought to guide the ICC judges.[107] This is compounded by lack of a sentencing policy evidenced by the absence of sentencing guidelines to guide the application of human rights norms. The ICC statute and RPE Part III, for instance, are silent on the manner in which legal rules and procedures might provide guidance towards the achievement of a communitarian philosophy of punishment. This has led some to argue that the sentencing structure in the ICC is rendered legitimate by an assumed 'moral right' to apply retributive punishment on those found guilty of war crimes.[108]

The Preamble to the Rome Statute refers 'vaguely' to retribution, deterrence and expressivism but does not state how these objectives could be actualised in the judgments.[109] Yet explicit penal objectives would have helped in the process of structuring, imposing and implementing sentences.[110] The purpose of sentencing, may however be gleaned from statements made by the Nuremberg and Tokyo War Crimes tribunals that suggest that retribution is the main objective of such prosecutions.[111] Moreover, there is some confusion as to the scope and meaning of penal justifications in sentencing by the ad hoc international tribunals. For example, as Henham points out, the ICTY Trial Chamber in *Erdemovic* failed to define the purpose and explore the meaning of deterrence within the trial context.[112]

[107] R. Henham, 'Some issues for Sentencing' (2003) *op cit*, 81, 85-86. This point is made by S. Beresford, 'Unshackling the Paper Tiger: The Sentencing Practices of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda' (2001) 1 *International Criminal Law Review* 33-90, 40-46.
[108] R. Henham, 'The Philosophical Foundations of International Sentencing' (2003) *op cit* 74-75.
[109] M. Drumbl *op cit* at 52 and Chapter 6 explores what he calls the 3 central objectives of international punishment.
[110] D. Smit, (2002) *op cit* 15.
[111] R. Henham, 'Some issues for Sentencing' (2003) *op cit* 85-86.
[112] *Prosecutor v Erdemovic* (Case No.IT-96-22-T) Sentencing Judgment: 29 November 1996. R. Henham *ibid* 87-88, also gives the example of *Prosecutor v G. A. N. Rutaganda* (ICTR-96-3-T) where absence of principles led to unclear sentencing outcomes. For an in depth critique of the 'lenient' sentences handed down by the ICTY see M. Harmon and F. Gaynor, 'Ordinary Sentences for Extraordinary Crimes' (2007) 5 (3) *Journal of International Criminal Justice* 683-712.

Expressivism is a modern theory of denunciation delivered in form of judicial pronouncement. Under expressivism, criminal procedures and punishment are an opportunity for communicating with offender, victim and society the nature of the wrong; the objective being to engage offenders and help them to understand the wrong in their actions.[113] The relevance of this educative function was stated by the ICTY in *Kordic and Cerkez* and accepted by the ICTY Appeals Chamber in *Krstic*.[114] Expressivism resonates with the traditional restorative process, where norms and 'folk wisdom' are reiterated by the elders or chiefs in their speeches.

Other objectives like rehabilitation and reconciliation remain inconsistently applied by international tribunals.[115] Tribunals for instance, are concerned that if given prominence, rehabilitation could violate the principle of proportionality and endanger other purposes of sentencing.[116] Rehabilitation includes a guilty plea and coming face-to-face with the victims in the hope that this act may prevent the likelihood of the offender committing such atrocities again.[117] Reconciliation, a key objective of the ICTY and ICTR, is usually invoked as a penal objective, but not put into effect in sentencing.[118]

One criticism of the Rome Statute and its (RPE) - Section III, is that despite having provisions for restorative justice, problems remain in the definition of restorative justice and conceptualising the connection between rehabilitation and reconciliation.[119] While I agree with these criticisms, I see the main problem as lack of engagement with traditional participatory restorative processes by drawing on similarities while mitigating divergence. Following from the analysis in Section 2, though largely retributive, international penal objectives including those inconsistently applied like reconciliation and rehabilitation; bear some similarity to traditional restorative objectives. What do not exist, are provisions in the international

[113] R. Cryer et al *op cit* at 23
[114] *Prosecutor v Kordic and Cerkez* (IT-95-14/2-A) ICTY Judgement of 17th December 2004 para 1080-1; and *Prosecutor v Krstic* (IT-98-33-A) ICTY Judgement of 19th April 2004 paras. 36-37.
[115] M. Drumbl *op cit* 12, 62 and R. Cryer et al *op cit* at 22.
[116] *Kordic op cit* at 1073.
[117] Examples are: *Prosecutor v Deronjic* (IT-02-61-S) Separate Opinion of Judge Mumba, 30th March 2004 paras.2-3; *Prosecutor v Babic* (IT-03-72-S) Sentencing Judgement 29th June 2004 para 46.
[118] M. Drumbl *op cit* 60-63. Examples are *Prosecutor v Babic* ICTY (IT-03-72-A) Appeals Chamber, Judgement of 18th July 2005 and dissenting Judgment of Judge Mumba; *Prosecutor v Jean de Dieu Kamuhanda* (ICTR-95-54A-T) Judgment of 22nd January 2004 para 754 and *Prosecutor v L. Semanza* (ICTR-97-20-T) Sentencing Judgement 15th May 2003 para 554.
[119] R. Henham, 'The Philosophical Foundations of International Sentencing' (2003) 1 (1) *Journal of International Criminal Justice* 64-85, 81.

sentencing framework for rituals that mark reconciliation (and rehabilitation) of the individual such as the *Mato Oput* described in Chapter 1.

International criminal procedure does not encourage open public deliberations of sentence. Such lack of communal decision making is evident in Article 74(4) and Rule 142 where the judges deliberate on sentence in secret. This means that the justifications for punishment arguably do not need to go beyond limits imposed by philosophies of limited retribution and deterrence.[120] Ultimately the procedure fails to take into consideration the contextual reality that the process of punishment could address, namely engaging with victim communities.[121] Therefore, although the Statute and RPE provide for reparatory sentencing hearings in Article 76(3), the process by which reparative orders are arrived at remains in the sole control of the judge. The emphasis on retribution can be traced to negotiating history of the Statute.

-Negotiating history

In sub section (iii) above, we saw that the focus during negotiations was on capital punishment illustrated in the intense debates in the Prep Com on different national penal sanctions and their penal functions.[122] This diversity of opinion mirrored the one that took place in the ILC on imprisonment.[123] Eventually, as Fife explains, consensus emerged for a single provision in Article 77 on imprisonment (as the main penalty) aimed to give flexibility to judges in sentencing, consistent with the principle of legality.[124] The upshot of these negotiations was that less attention was

[120] R. Henham, (2004) *op cit*, 191.
[121] Rome Statute *op cit* Article 75 (3), and Rule 97 (2). This lends credence to R. Henham's views that notions of restorative justice should be developed in the sentencing praxis, although he sees this as based on state practice: *Punishment and Process in International Criminal Trials* (Ashgate Publishing: Hants, Burlington, 2005) 198. Also R. Henham 'The Philosophical Foundations' (2003) *op cit* 77-78.
[122] R. Fife, *op cit*, para 7-10 pp. 989-990. The statute now provides for imprisonment for not more than 30 years or life imprisonment for grave offences under Article 77 (1) (a) (b).
[123] D. V. Zyl Smit, 'Life Imprisonment as the Ultimate Penalty in International Law: A Human Rights Perspective' (1999) 9 *Criminal Law Forum* 5-54, 19-26 46-49 giving an excellent discussion of the debates in the ILC on imprisonment.
[124] R. Fife *op cit* p. 900 paras. 9-10 & pp. 988-989 para 6. Article 23 provides for the principle of legality: nulla poena sine lege. Prep Com debates in UN Doc. A/48/10 (1993) para 84. Article 77 drew largely from the ILC draft Article 47 (1) that also included the possibility of life imprisonment and fines. A revised draft was submitted: UN Doc A/49/355 (1994) but it did not change this penalties provision significantly; W. A Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2001) Chapter 7. Under Article 77 2 (a) and (b), the court may in addition to imprisonment, order a fine or forfeiture of proceeds, property and assets derived from the crime.

paid to setting penal objectives and standards for sentencing. This does not mean there were no penalties that were 'African'.

During negotiations there were disagreements over whether the right to reparations should prevail but it later became clear to delegates that victims had an interest in restorative justice in the form of compensation or restitution. According to Muttukumaru, it was hoped that reparation could contribute to reconciliation at the individual level and facilitate restoration of society. Even the merits of using reparation to pay for rehabilitation were discussed.[125] In the final text, Article 75 (1) and (2) allowed judges to deploy a range of remedies. These remedies, however, did not include traditional forms of punishment like 'ritualistic satisfaction' or any form of reconciliatory rituals. This arose from reliance on the influential texts by France and the UK that as we have seen, gave modern reparative justice perspectives. Non state indigenous philosophies of justice were not considered because the debates were focused on national penalties, particularly imprisonment. I now turn to the third premise of individual human rights protection.

(v) Human rights underpinnings

We saw in the previous chapter, that the ICC normative sentencing framework is premised on protection of rights of the accused person. In this subsection, I show that victims only have 'participatory rights'. A communitarian notion of rights where the community are equally rights holders on behalf of their kin is excluded. This pre-occupation with the individual accused's rights can be traced to the focus on substantive sentence; the replication of Article 14 ICCPR rights during the negotiations; and the evolution of due process guarantees.

Some argue that the debate around standard setting in restorative justice needs to be widened to include communitarian interests.[126] Nonetheless, the inclusion of a participatory restorative approach needs to be located within the broader question of how to meld the traditional with the international by drawing on procedural rights as a sort of normative bridge. This is important for, as Braithwaite maintains, the constraining values in restorative justice are procedural safeguards that take priority

[125] C. Muttukumaru *op cit* 264, 267.
[126] A. Skelton and C. Frank, 'How does Restorative justice address human rights and due process issues?' in H. Zehr and B. Toews, *Critical Issues in Restorative Justice* (Monsey, NY: Criminal Justice Press, 2004) 210.

when there is any sanction or violation of freedom.[127] To deal with this question, we need to explore whether the ICC could apply international human rights standards (as obligated under Article 21(3)) to ensure that the sentence is arrived at through a procedure that is perceived as fair in a culturally diverse context.

To start with, human rights issues have traditionally revolved round the substantive sentence itself. I contend that the lack of explicit procedural guarantees in Article 76 may be attributed to an emphasis on the philosophical notion that penalties should be limited by human rights guaranteed in the international instruments. As Smit rightly puts it, human rights concerns focus on determining what sentence would be regarded as compatible with human rights standards.[128] The concerns are also about the enforcement of sentence to ensure due process principles are complied with, to protect the prisoner's rights.[129] A handful of academics have grappled with the problem of rights in international sentencing procedure and I will draw on their work throughout the thesis.

Henham, for example, describes the incorporation of human rights into rules and procedures of international criminal courts as 'symbolic', because of the pervasiveness of retribution in international penal law. He then identifies gaps in procedural rights protection, for instance during the deliberation and pronouncement of sentence: like the right to be informed of the charges and the right to language of choice; all of which, he argues, ought to extend to separate sentencing hearings. There is no obligation on the ICC to give an account of the process by which the deliberations held in secret are arrived at. For Henham, the absence of a mandatory procedure for transparency in sentence decision-making, stems from systemic weaknesses that render procedural safeguards more 'apparent than real' because there is no need for them to be otherwise. Henham rightly points out that there is a danger

[127] J. Braithwaite, 'Principles of Restorative justice' in A. Von Hirsch, J. Roberts, A. E. Bottoms, K. Roach and M. Schiff (eds.), *Restorative Justice and Criminal Justice: Competitive or Reconcilable Paradigms?* (Oxford: Hart Publishing, 2003) 8-11. Other values include honouring legally specific upper limits on sanctions, accountability and 'appealability', and respect for fundamental human rights in international instruments. Also J. Braithwaite, 'Standards for Restorative Justice' (2002) 42 (3) *British Journal of Criminology* 563-577, 569-570.

[128] D. Smit (2005) *op cit* 361. A notorious example is the prohibition of punishments considered to be cruel, inhuman and degrading by their excessive length or severity. Smit notes that principles of human dignity and due process are vital in deciding how imprisonment must be imposed to meet human rights standards.

[129] *Ibid*, 361-365, also D. Smit (1999) *op cit* 12-13.

of a purely individualistic approach to rights which arises in the context of a 'mono' phase of sentencing where the presentation of evidence is not well regulated.[130]

Zappala argues for a policy based inclusion of rights for the defendant during sentencing.[131] He favours the extension of human rights provisions on due process into international criminal proceedings, despite the ambiguity in the ICC sentencing phases concerning whether it embodies a one or two phase approach. Zappala argues that the right to give evidence protects the rights of the defendant better, particularly in a two stage sentencing process. Accused persons are able to present their evidence, knowing they have been convicted for well specified reasons and can effectively plead in mitigation.[132] Zappala then focuses his excellent discussion of the rights of convicted persons on such matters as the right to individualisation of sentence, the right to rehabilitation, and the problem of multiple and concurrent versus consecutive sentences.[133] However, Zappala' *proposed* rights, are not yet recognised under international human rights law. In any case, they apply only to the individual accused person.

The emphasis on individual protection of accused's rights[134] is best understood through an examination of the scope of victim rights on which the ICC model is based. Under Article 68 (3), the court shall permit the victim's personal interests to be presented at any stage of the proceedings as deemed appropriate, in a manner not prejudicial to the accused person's rights and the fairness of the trial. Scholars like Bassiouni rightly point to the ambiguity in the Rome Statute where the term 'participant' and 'party' are used alternatively, yet they have different role implications. A 'party' would have certain procedural rights by implication and a 'participant' has only those rights specified in the statute. The victim participant would have no rights to present evidence, examine or cross-examine witnesses for either side. In his view, the statute's legislative history does not indicate that a victim

[130] R. Henham (2004) *op cit* 186, 190 -191 citing W. A Schabas, 'Protective Measures for Victims and Witnesses Versus the Rights of the Defendants', paper presented at University of Utrecht, 2001. In a 'mono' phase there is no separate hearing specifically on sentencing.
[131] S. Zappala *op cit* 7.
[132] *Ibid*, note 1, p.198. To support his argument, he relies on provisions that allow the Chambers to receive relevant information like Rule 100 ICTY/ICTR and Rule 143 ICC.
[133] *Ibid*, Chapter 5, 199-299.
[134] *Ibid*, Chapter 6.

was meant to be anything more than a participant.[135] Bassiouni's analysis is borne out by the ICC jurisprudence.

In its early jurisprudence, Pre-Trial Chamber 1 in *Situation in the Democratic Republic of Congo* dealt with the issue of whether victims could participate in the investigation stage of a situation under Article 68 (3). Considering that the debate by the drafters surrounding the purpose of victims' participation took place in the milieu of growing emphasis on the role of victims under the international human rights law;[136] the Chamber found that Article 68(3) is applicable during the investigation stage of a situation.[137] In short, victims could take part in the investigation stage though only as participants, not parties with inherent procedural rights. This decision was followed by the Pre Trial Chamber II in the *Situation in Uganda*.[138]

The Appeals Chamber later in *Prosecutor v T. Lubanga Dyilo*[139] also emphasised that the rights to lead evidence on guilt and to challenge its admissibility or relevance, lies with the parties, Prosecutor and Defence, in Article 69(3). However, victims are not precluded from doing so. Article 69(3) does not give unfettered right to victims to lead or challenge evidence. Rather, victims must demonstrate why their interests are affected by the evidence (or issue) then the Trial Chamber decides whether or not to permit such participation. The Trial Chamber will, or, at least, should, exercise this power in such a way as to achieve consistency with the rights of the accused and a fair trial.[140]

The following points emerge from the ICC jurisprudence. Some like Hemptinne and Rindi have argued that the early decisions demonstrate that the judges intend to exercise constant sole judicial control over implementation of the victim's right to participation.[141] The judges, however, view this control as part of their duty to

[135] M. C Bassiouni, 'International Recognition of Victim's rights' (2006) 6 (2) *Human Rights Law Review* 203-279, 245 -246.
[136] *Situation in the Democratic Republic of Congo* ICC-01/04-101-tEN-Corr *Decision on the Applications for participation in the proceedings of VPRS1-VPRS6* of 17 January 2006 para 50, note 49 citing W. Schabas *An introduction to The International Criminal Court* (2004) at 172.
[137] *Ibid*, para 54.
[138] *Situation in Uganda* ICC-02/04-101 *Decision on Victims' applications for participation a/0010/06, a0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06* of 10th August 2007 paras 5,7.
[139] *Prosecutor v T. Lubanga Dyilo* ICC-01/04-01/06-1432 *Appeals of the Prosecutor and the Defence against Trial Chamber 1's decision on Victims' Participation* of 18th January 2008, confirming the finding of the Trial Chamber in ICC-01/04-01/06- Decision on victim's participation, para 96 and 108.
[140] *Ibid*, paras. 93, 94, 99 and 104. Others points for consideration include: demonstration of victim's personal interests, and determination of appropriateness.
[141] J. Hemptinne and F. Rindi, 'ICC Pre-Trial Chamber allows victims to participate in the investigations phase of proceedings' (2006) 4 (2) *Journal of International Criminal Justice* 342-

determine the modalities of victim participation.[142] Still, others like Findlay and Henham describe the victim's rights as merely symbolic.[143] Henham also suggests that victim's rights will not be given serious consideration; rather they will be equated with the notion of retributive justice with little thought given to what might be appropriate under a restorative or reparative paradigm.[144] I agree with these views. I surmise that the Rome Statute does not guarantee victim's participation to the full extent possible because the victim has no 'rights' to intervene as and when they wish like in a traditional context.

However, there are also valid concerns about victim's participation in sentencing. In some countries like England, the objection to victim's participation at the sentencing stage is because of a fear that their subjectivity may tip the scales heavily against the offender. Ashworth questions to what extent the victim's view should play a role in sentencing in adversarial trials, arguing that their participation in determining the sentence does not render the trial fair.[145] Ashworth examines victim participation in the context of the ECHR that applies the principle of a fair hearing to the sentencing stage. In his view, permitting the victim or their family to decide sentencing outcome goes against the tenets of an independent and impartial tribunal. The victim, Ashworth argues, is not impartial and cannot know the sentencing options available. Moreover, the state has a duty of fairness to see that similarly situated offenders (in terms of culpability) are treated alike.[146] Besides, it would be unfair if sentences on offenders varied according to whether a particular victim is forgiving or vengeful.[147]

350,346 discussing these earlier decisions in ICC-01/04-101-tEN-Corr of 17 January 2006 and ICC-02/04-101 of 10-08-2007 discussed above.

[142] D. D. N Nsereko, 'The Role Of The International Criminal Tribunals In The Promotion Of Peace And Justice: The Case Of The International Criminal Court' (2008) 19 *Criminal Law Forum* 373-393. Nsereko, a judge of the ICC Appeals Chamber, submits that the duty of the judges is to 'steer a careful path' in the unchartered territory of victim participation in ICC proceedings: 385-386.

[143] M. Findlay and R. Henham *op cit* 284-285. Also R. Henham, *Punishment and Process* (2005) *op cit* at 95.

[144] R. Henham 'Some issues for Sentencing' *op cit* (2003) 108-111.

[145] A. Ashworth, 'Responsibilities, Rights and Restorative Justice' (2002) 42 (3) *British Journal of Criminology* 578-595, 586-587. For Ashworth, crime is a matter for public interest and goes beyond the victim's interest in seeing the offender punished: he cites *R v Nunn* [1996] 2 Cr. App. R (S) 136 to illustrate courts' reluctance to give victims the last word on sentence.

[146] *Ibid*.

[147] A. Ashworth, 'Victim's Rights, Defendants' Rights and Criminal Procedure in A. Crawford and J. Goodey (eds.), *Integrating A Victim Perspective Within Criminal Justice: International Debates* (Aldershot: Ashgate/Dartmouth, 2000) argues there must be a principled basis for balancing between personal interests of victims and broader public interest in restorative justice: 196.

Some like Skelton and Frank would agree, and point to the possibility of variation in outcomes because the process is victim driven, though they suggest that this can be managed through standards ensuring restriction of penalties.[148] Others like Smit rightly warn against the dangers of a politically driven victim's movement that may urge the ICC to continue to detain prisoners. Still, Smit makes an important point that the engagement of victims allows for the introduction of restorative processes that were never envisaged before in the context of international imprisonment.[149] Victims, however, may well be more lenient than the public might imagine. Indeed in New Zealand there is evidence that victims tend to demand less harsh punishments than just desert theorists expect.[150]

In response, I would say that based on our discussion of traditional restorative justice in Section 2 above, Ashworth's arguments would not hold in an African setting. This is because he places too much weight on equality in only one sense (that similarly culpable offenders should suffer likewise) and insufficient weight on other values (such as victim participation). In the African context, as we have discussed, a higher value is given to communal deliberation, participation and reconciliation, than to a formal notion of equal sentences and impartial tribunal. The defendants and their kin deliberate the sentence as much as the victim and their family, so they are placed in an equal position (a different sense of 'equality'). This is the underlying principle of traditional participatory justice. The reason the victim participates actively, is because the traditional model is focussed on vindicating the victim and his or her rights.[151] This is not the same, as say the giving of a victim impact statement that does not involve a discussion of sentence by the victim, as would happen in the context discussed by Ashworth.

International trials also do not permit full participation of offenders in negotiating sentence, despite calls from some for offenders to have participative 'rights' in a negotiated sentence.[152] Scholars like Henham disagree with any

[148] A. Skelton and C. Frank *op cit* 206.
[149] D. V Z Smit, makes this point while considering the scope of Rule 223 (which supplements the grounds for reduction of sentence on appeal) in developing the victim's role in the imposition of and implementation of sentences: 'International Imprisonment' (2005) 54 *International and Comparative Law Quarterly* 357-386, 377.
[150] J. Braithwaite, 'Principles of Restorative justice,' in A. Von Hirsch et al, (2003) *op cit,*18.
[151] S. 2 *op cit,* also Ch. 1 S. 6(i) o*p cit,* and D. Nsereko, *op cit* (2002), 22-25.
[152] R. A Duff, 'Penance, Punishment and the limits of community' (2003) at 187, cited by R. Henham note 35 in *Punishment and Process* (2005) *op cit* at 95. Negotiated sentence is discussed further in Ch.4 S.3 (iii) *infra*.

suggestion that an offender should have any participative 'rights' in negotiated sentence process.[153] This disagreement, arises from the fact that having pleaded guilty or been proven guilty of an offence, an offender loses participative 'rights'. My arguments above apply equally here: the offender in a traditional setting would still retain their participative 'right' to contest or deliberate the sentence, all the while supported by their kin. The same applies to the victim, and my empirical study illustrates how this works in practice. The point here is that both instances exemplify the tensions between the international and traditional normative models.

With regards to accommodating community interests, there are no provisions in the Rome Statute on communitarian values. The international model, as Henham convincingly puts it, seems to defeat the purpose of a separate sentencing hearing that could encourage judicial transparency through public perception and rational evaluation of evidence.[154] Such public perception would arguably integrate a communitarian concept of rights. The absence of provisions on community interests is because a 'due process' model, stresses adherence to court room procedure and protection of the individual.[155] This protection, that denotes a preoccupation with individual rights of the accused, is best understood from an appraisal of the negotiating history of the Rome Statute.

(a) Negotiating history

The ILC in its commentaries on Article 46 (1) of the Draft Statute stated that '(…) the fundamental procedural guarantees inherent in a fair trial, notably the right to counsel, also extend to the sentencing hearing.' Since the debates on Article 76 were perfunctory, the ILC commentary on procedural guarantees in sentencing hearings was not considered because of the delegates' pre-occupation with accused's rights during pre-trial and the trial itself.

One example is Article 67 on rights of the accused, which was modelled on Article 14 ICCPR and the statutes of the ad hoc tribunals. The method of drafting was to adopt Article 14 ICCPR and enlarge some of the provisions.[156] This work was done

[153] *Ibid*, note 35 disagreeing with Duff's suggestion.
[154] R. Henham (2005) *op cit* Chapter 3, 94.
[155] R. Henham, 'Human Rights, Due Process and Sentencing' (1988) 38 (4) *British Journal of Criminology* 592-610, 592.
[156] W. Schabas, 'Article 67- Rights of the Accused' in O. Triffterer (ed.) (1999) *op cit* 847.

by the informal working group at the August 1996 Prep Com session[157] and addressed in detail by the Prep Com in August 1997.[158] The 1997 draft was reproduced in the Zutphen compilation and the final Draft of the Prep Com with little modification.[159] Intense debates arose on issues like the precise meaning of 'language' of choice due to the different legal definitions in common law and civil law.[160] The debates were not about the needs of the different local communities, rather the preferences of dominant legal systems. Unsurprisingly, in the drafting of the ICC RPE, the focus was on balancing interests of witnesses with the rights of suspects and the accused- due in part to the fact that the draft texts from Australia, France and The American Bar Association swayed the discussion.[161]

Reaching an agreement on the victim's participatory 'right' under Article 68 (3) was prompted by severe criticisms of the manner in which victims were handled by the ICTR.[162] Hence, the delegates thought it was morally proper to grant victims this right to enable the Court be appraised of their sufferings.[163] However, victims' participation is without prejudice to the defendant's right to a fair trial. As we saw previously, the procedural norms of the Rome Statute emphasise that victims have the 'faculty' (not the right)' to make representations in pre-trial, reparations and appeal stages. For Donnat-Cattin, these norms embrace two concepts. The first is rights of the accused as set out in Article 67 and the second is a fair trial that includes rights for the defendant and victims. This concept he calls 'equitable justice' which underpins all procedural norms of the Rome Statute.[164] While I do not fault his reasoning, I maintain that the intention of the drafters, as I pointed out earlier, was to allow

[157] Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N GAOR, 51st Sess., Supp. No. 10, U.N.Doc. A/51/10, Vol. I paras. 270-279, pp.57-59.
[158] Decisions taken by the Preparatory Committee at its Session held from 5-15 August 1997, U.N. Doc. A/AC.249/1997/L.8/Rev.1 pp. 34-36. These amendments are discussed in W. Schabas 'Article 67' *op cit* 845-868.
[159] Report of the Inter-Sessional Meeting from 19-30 January 1998 in Zutphen, The Netherlands, U.N Doc.A/AC.249/1998/L.13, pp. 114-115; Draft Statute for the International Criminal Court, U.N Doc. A/CONF.183/2/Rev.1, pp. 126-128.
[160] H. Friman, 'IV. Rights of Persons suspected or accused of a Crime' in R. S Lee (ed.), (2002) *op cit* 248- 253.
[161] D. Turns and C Byron, 'The Preparatory Commission for the International Criminal Court' (2001) 50 (2) *ICLQ* 420-435, 430-433. The draft texts in UN Doc. PCNICC/1999/DP.1 and UN Doc PCNICC/1999/DP.43 are available at www.igc.org/icc/html/aba.htm. Visited on 11/12/2008.
[162] D. Donat-Cattin 'Article 68- Protection of victims and their participation in the proceedings' in O. Triffterer (ed.) (1999) *op cit* pp. 869-888,871-872.
[163] C. Jorda and J. De Hemptienne, 'The Status and Role of the Victim' in Cassese-Gaeta-Jones (eds.) (2002) *op cit*, 1400.
[164] D. Donat-Cattin, 'Reparation to Victims' in O. Triffterer (ed.) (1999) *op cit* para 23, p. 880: Articles 15 (3), 75 (3) and 82 (4) and Donat-Cattin 'Article 68' *op cit* para 18 p. 877.

participation only in open procedures of the court. It follows from a traditional perspective, that determination of sentence, done as it is in secret, lacks local procedural legitimacy and would not be perceived as 'equitable' justice. I now trace the historical development of due process and international human rights standards in the next subsection.

(b) Evolution of due process guarantees

Human rights are a 'cultural and value laden concept' that symbolises rights a person is entitled to for no other reason than their humanity. Human rights are about limited government, the relationship between people and their political authority.[165] In a Hohfeldian sense, rights are justified claims or entitlements to the carrying out of duties positive or negative.[166] So human rights evolve from two broad conceptions of negative and positive rights.

Negative rights protect the individual from interference from the state and other individuals.[167] For instance, the state should refrain from meddling with the impartial execution of administration of justice by the courts. Positive rights doctrine, argues that there is a right to positive acts by the state. This right is based on the assumption that it is partly the role of the state to have overall responsibility to ensure that society is properly structured. A subset of positive rights according to Alexy[168] is protective rights: a right against the state that protects individuals from interference from third parties. Among these protective rights are procedural rights. One example is the court procedures whose outcome protects the substantive rights of the right-holder affected.[169]

The protective role of positive procedural rights is manifested in the origins of due process that lie in the English Magna Carta of 1215, wherein the sovereign decreed that no free man would be imprisoned or deprived of liberty 'except by legal judgement of his peers and by the law of the land'.[170] The 17th and 18th century

[165] O. O Elechi, *Human Rights and the African Indigenous System* paper presented at the 18th International Conference for the Reform of Criminal Law, Montreal, August 2004, 4-5. Found at: www.isrcl.org/Papers/2004/Elechi.pdf visited on 10/11/2008.
[166] A. Gerwith (1982) *op cit* 219.
[167] R. Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, trans. Julian Rivers, 2002) 122-126.
[168] *Ibid*, Chapter 9.
[169] *Ibid*, 314-334, 326.
[170] Chapter 39 Magna Carta, cited in S. Zappala (2003) *op cit* at 3. Discussed in Ch.1 S.2 *op cit*.

reformist theories from the English, American and French revolutions combined a political philosophy of liberal individualism with the economic and social doctrine of laissez-faire in the search for human dignity.[171] The ideology of the Enlightenment influenced the principles of due process now common to both adversarial and inquisitorial legal systems.[172] Citizens' status changed to that of subjects (rather than objects) of government's powers and there were limits on the power the state could have over the liberty and security of the person.[173] Some of the rights that accompanied the duty to respect the person were the right to silence, presumption of innocence, to be informed of charges and to prepare a defence.[174] One of the distinctive features of the criminal process was respect for defendant's rights.[175] Protecting defendant's rights permeated through western societies till the world wars.

The first international prosecution appears to have been that of Conradin von Hofenstafen who was tried for waging aggressive war in 1268.[176] Later in 1474, Peter von Hagenbaach was tried under the first known international court comprising 28 judges: representatives of the hanseatic cities, sitting at Breisach in Germany. His crimes included murder and rape for which he was convicted and beheaded.[177] Centuries later, following World War I, the Treaty of Versailles was entered into in 1919.[178] Article 227 thereof created an international criminal tribunal, comprising 5 judges- one from each of the victors, to try Kaiser Wilhelm II for initiating the war.

[171] S. Greer traces the reforms following the collapse of feudalism and emergence of new theories of legitimate social order (2006) *op cit* 2-4. B. H Weston, 'Human Rights' (1984) 6 *Human Rights Quarterly* 257-283, at 264 gives an extensive historical account of human rights and legal processes.
[172] M. Damaska (1975) *op cit* 480-544.
[173] C. Safferling *op cit* 21.
[174] *Ibid*, 21discussing the Virginia Bill of Rights 25 September 1788. The first trials based on this doctrine were in England in the mid 18th century: R. Volger *op cit* at 131. Eventually the influence from the common law trial spread to the United States 1791 Constitution that enunciated due process rights in the American Bill of Rights (Amendment V): S. Greer (2006) *op cit* 4. Following the French Revolution due process rights were entrenched in the inquisitorial system. For example, the principle of innocent till proven guilty was put in the French Declaration of Rights of Man and Citizen (Declaration des Droits de L`Homme et du Citoyen), 26, August 1789: Volger *ibid* 53-60, Safferling *ibid* 22 and Greer *ibid*.
[175] F. Tulkens, 'Criminal Procedure' in M. Delmas-Marty (ed.), (1995) *op cit* 7.
[176] D. McGoldrick (2004) *op cit* 13; L. Sunga *op cit* 279.
[177]D. McGoldrick *ibid* 13. D. D. N Nsereko, 'The International Criminal Court: Jurisdictional and Related Issues' (1999) 10 (1) *Criminal Law Forum* 87-210, 87.
[178] Treaty of Peace between the Allied and Associated Powers and Germany ('Treaty of Versailles') 1919 T.S. 4, entered into force on 28 June 1919.

This trial never took place because the Kaiser fled to the Netherlands and the idea of prosecuting him was abandoned.[179]

After World War II came the Nuremberg and Tokyo tribunals, both created by statute following the Moscow Declaration of 1943.[180] The Nuremberg Charter set out a procedure to ensure that defendants received a fair trial. This included the right to legal representation, the right to information of charges in a language of choice; the right to cross examine witnesses and the right to adduce evidence.[181] The judges then incorporated due process principles into international law. For example, Judge Rutledge in the *Tomoyuki Yamasita* trial at Tokyo held that the conviction would rest on proven fact and a fair chance to defend.[182] The Goering verdict of 1946 at Nuremberg started the development of international tribunals and set the high moral ground on which human rights was grounded.[183]

However, there were questions of procedural fairness that arose. For instance, Article 12 permitted trials in absentia which negated the right to be heard and to prepare a defence.[184] Also, defendants were denied a right to confront witnesses through use of ex parte affidavits; were denied permission to use hearsay evidence; had no right to judicial appeal; and there was no prohibition of ex post facto laws.[185] This has led Zappala to conclude that the Nuremberg and Tokyo trials did not meet contemporary standards of procedural fairness.[186] Despite this, Nuremberg is

[179] A. Cassese (2008) *op cit* 317-319; W. Schabas, 'International Justice' (2006) *op cit*, 421-422. D. Nsereko (1999) *op cit*, 88; D. McGoldrick *op cit* 14, and L. Sunga *op cit* 279-281 on the failure of the Versailles Treaty and non prosecution of the Kaiser.

[180] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, London 8 August 1945, 8 U.N.T.S. 279, Annex, Charter of the International Military Tribunal; International Military Tribunal for the Far East, Proclaimed at Tokyo, 19 January 1946 and amended 26th April 1946, TIAS No. 1589, Annex, Charter of the International Military Tribunal for the Far East, D. McGoldrick, D. Nsereko (1999) *op cit*. The history of and an assessment of these tribunals is undertaken by R. Cryer, et al (2007) *op cit* 92-100.

[181] Nuremberg Charter *op cit* Article 16 (a)-(d). L. Sunga *op cit* 313. Also Q. Wright 'The Law of the Nuremberg Trial' (1947) 41 *AJIL* cited in Sunga *ibid*, note 50.

[182] *United States of America v Yamashita*, (1948) 4 LRTWC 1, 36-37. This case involved the trial of *Yamashita*- a Japanese general, for atrocities committed in the Philippines: G. MacCarrick *op cit* 24-25. Q. Wright, 'Due Process and International Law (1946) 40 (2) *AJIL* 398-406, 399-400 pointing out that questions of procedure were determined by international law and the commanding officer.

[183] G. MacCarrick *ibid* 25-30.

[184] L. Sunga *op cit* 312.

[185] G. MacCarrick *op cit* 28-29, R. May and M. Wierda 'Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague and Arusha' (1998-1999) 37 *Columbia Journal of Transnational Law* 725-766, 731.

[186] S. Zappala, 'Rights of the Accused' in A. Cassese, et al (eds.), (2002) *op cit* 1324. M. C Bassiouni (2003) *op cit* 585 makes the point that principles of legality were violated because the rules were not established before hand. R. Cryer et al (2007) *op cit* while acknowledging these weaknesses, argue that to the contrary, these procedural flaws reflect the standards applicable to trials at the time: 95-96.

regarded as the 'precedent' that developed international human rights law by holding individuals responsible for violations of international law.[187]

As we saw in Chapter 1, the Nuremberg and Tokyo trials led to the development of procedural rights in Article 14 ICCPR by redressing the inequality of arms between the accused and the prosecution.[188] Bassiouni notes how in earlier inquisitorial systems, defence counsel had no right of audience before the court during the trial, but that the human rights instruments marked a deliberate shift towards the common law-adversarial procedures.[189] Common law-adversarial procedure ensures equal rights of audience between the prosecution and the defence- which feature is replicated in other hybrid international criminal tribunals.[190] What is common to all these international tribunals is the adoption of a universal protection of individual human rights[191] expounded by due process guarantees and underpinned by principles of autonomy and equality.

(c) Law applicable

The universal application of human rights is expressed in Article 21 (3) of the Rome Statute. There, international human rights standards provide the test of consistency for the applicable law of the ICC which includes principles of national

[187] H. Kelsen, 'Will The Judgment At Nuremberg Constitute A Precedent?' (1947) 1 (2) *International Law Quarterly* 153-171 and D. McGoldrick *op cit* 19. Such violations under Nazi laws included the extermination of Jews, and execution without trial: B. Weston *op cit* 261.

[188] D. Weissbrodt and M. Hallendorff *op cit* discussed in Ch. 1. S. 2(i). C. DeFrancia 'Due Process in International Criminal Courts: Why Procedure matters' (2001) 87 *Virginia Law Review* 1381-1439 at 1393-1397 gives a historical account of the development of due process norms in international law.

[189] M. C Bassiouni, 'Human Rights In The Context Of Criminal Justice: Identifying International Protections And Equivalent Protections In National Constitutions' (1992-1993) 3 *Duke Journal of Comparative and International Law* 235-298, 277.

[190] Some commentaries are: G. K Sluiter, 'Due Process and Criminal Procedure in the Cambodian Extraordinary Chambers' (2006) 4 (2) *Journal of International Criminal Justice* 314-326, giving a critique of the Chambers procedural safeguards; C. Reiger and M. Wierda, *The Serious Crimes Process in Timor-Leste: In Retrospect* (International Centre for Transitional Justice, March 2006) appraises the procedural framework of the Serious Crimes Panels in the District Court in East Timor in its aftermath; L. Dickinson, 'The Relationship between Hybrid Courts and International Courts: The Case of Kosovo' (2003) 37 (4) *New England Law Journal* 1059-1072 discusses how hybrid courts complement both international and national justice frameworks; C. Aptel, 'Some innovations in the statute of the Special tribunal for Lebanon' (2007) 5 *Journal of International Criminal Justice* 1107-1124, analyses the tribunal's innovative procedural safeguards; and G. Mettraux, 'The 2005 Revision of the Statute of the Iraqi Special Tribunal' (2007) 5 (1) *Journal of International Criminal Justice* 1-7 evaluates the fairness of the Iraqi Special Tribunal proceedings.

[191] D. McGoldrick *op cit* 14-20 sees the greatest achievement of international law as the assessment of human rights against normative standards monitored under international procedures.

laws under Article 21 (1) (c). The ICC may also refer to its own previous decisions under Article 21 (2).

The negotiating history shows that there was accord among delegates that interpretation of law 'must be consistent with internationally recognised human rights' under Article 21 (3).[192] This provision was proposed by New Zealand and Samoa, and developed by Canada. Once again the emphasis was on protecting rights of the accused.[193] This general consistency test that also prohibited adverse distinction on grounds like gender and culture, proved to be highly contentious. Some countries, most notably China, wanted to shorten the paragraph to remove the distinctions so it would read: 'The application and interpretation of law pursuant to this article must be consistent with internationally recognised human rights.' Due to strong resistance by other countries, the article remained as it is.[194]

This universal application of human rights norms cannot be easily replicated in African crises because most countries are culturally diverse. For instance, Uganda, as we saw in Chapter 1, has legal pluralism wherein a society has its own type of 'government', to which it relates and recognises as the legitimate political authority that enforces a system of social control. The procedural model of the ICC does not, however, recognise traditional forms of government or their criminal jurisdiction.

Firstly, as we saw in sub-section (i) above, the Rome Statute deals with matters concerning the community of nation states only. Secondly, the negotiating history reflects the divergent opinions that emerged in the debate over the applicability of national laws in Article 21 (1). Some countries like China and Israel were emphatic that national law was directly applicable. Others were strongly of the view that national law should only be an indirect source. A compromise was proposed by Norway in which national laws would be applied 'as appropriate'.[195] Still, as the International Court of Justice has clarified, the role of the international judge is to regard features of general principles (in national laws) as indicative of legitimate policy and principles, rather than seek to import those rules and institutions.[196] Thus

[192] Report of the Inter-Sessional Meeting from 19-30 January 1998 in Zupten, The Netherlands, UN Doc. A/AC.249/1998/L 13 (1998) at page 64, n. 117.
[193] M. M de Guzman 'Article 21: Applicable Law' in O. Triffterer (ed.) (1999) *op cit* paras. 23-24, pp. 445-446.
[194] P. Saland, 'International Criminal Law Principles' in R. S. Lee (ed.) (2002) *op cit* 215-216. He was Chairman of the Working Group on applicable law.
[195] P. Saland *op cit*, 214-215.
[196] *South West Africa Case*, Advisory Opinion, (11 July) (1950) International Court of Justice, 28 at 148, Separate Opinion of Judge McNair.

the judges will apply principles underlying laws of the legal systems of the world.[197] In this thesis, I show that some national legal principles may prove difficult to apply. In Uganda, for instance, traditional clan laws were abolished by legislation, yet national courts are mandated by the constitution to apply norms and values 'of the people' as *ratione materiae*.

The application of discretionary use of precedent under Article 21(2) signifies the 'soft' case law approach proposed by Singapore. This arose out of a compromise between the common law approach to court decisions as binding precedent, and the civil law approach where judicial pronouncements bind only parties before the court.[198] Thus, the ICC has no equivalent to the common law principle of *stare decisis* and is not bound by its previous decisions. This soft case law approach could arguably help the ICC deal with legal dilemmas of the sort surmised above.

To sum up, the procedural model of the ICC is a hybrid of the adversarial-inquisitorial model that is based largely on retributive philosophical underpinnings. However, despite strong procedural safeguards for the defendant and participatory measures for victims, the protection of human rights in the sentencing phase is not as clear as the ILC suggests. More so, the international framework is not mandated to apply traditional restorative processes and penalties. Still, to ignore traditional approaches is in my view, to risk further lack of legitimatisation, evidenced by attempts to evade international criminal justice as illustrated in the Kony saga.[199]

Section 4: Conclusion

I have undertaken here a critical appraisal of legal factors that could influence reconciliation between the two normative frameworks. This analysis shows the lack of a theoretical framework within which international sentencing procedure could accommodate traditional African normative standards to achieve fair culturally appropriate sentencing outcomes. One reason is opposing procedural traditions. The ICC's sentencing framework comprises a judicially controlled sentencing process, largely retributive philosophical origins and a preponderance of protection of individual defendant's rights. This contrasts the 'shared' traditional restorative

[197] M de Guzman *op cit*, paras 16 pages 442-443.
[198] *Ibid* paras 21-22, page 445 and Per Saland *op cit* at 215. R. Cryer et al *op cit* 9 and note 47 on dangers of a court seeing international law through a national lens citing L. Sadat (1994).
[199] Ch. 1 S. 1 *op cit* discussing J. Kony and his rebel leaders' refusal to be tried by the ICC, preferring instead traditional restorative justice trials.

approach to decision making. Additionally, communitarian values conflict with notions of autonomy and equality inherent in Article 14 ICCPR. This incompatibility is exacerbated because the international sentencing framework has no provisions that take into account features of traditional justice as *part of* the sentencing process. Yet Article 76 has similarities with the traditional model in terms of hearing representations from the parties and 'interested persons' during reparations hearings; and the public pronouncement of sentence. International criminal justice through its penal objectives, may also find common ground with local communities' de facto sentencing regimes. Significantly, the divergence is compounded by the haphazard growth of international criminal procedure that has hindered progress of a 'cross cultural' discourse. So the community are vulnerable in the absence of communal participation in the sentencing process because they cannot reconcile the parties and their families. As a consequence the society is not in equilibrium. This needs to be addressed.

The importance of rights in criminal trials is their propensity to influence structure and procedure as a result of extending the human rights provisions on due process to international criminal proceedings.[200] Yet this chapter shows that human rights are not perceived as a normative bridge between the ICC and traditional process. Accordingly, complications arise where the disputes involve subjects of different cultural backgrounds due to a concern that bringing together two conflicting legal systems in cultural proximity may come into conflict with human rights guarantees.[201] What remains is to explore the debate in academic circles to see how academics and legal practitioners view the problem. Specifically, I am interested in whether and how they are looking outside the established system for ways to bring these conflicting legal systems in harmony with human rights guarantees. I pursue this interest in the next chapter.

[200] S. Zappala (2003) *op cit*, 7.
[201] J. Almqvist, 'The Impact of Cultural Diversity on International Criminal Proceedings' (2005) *Journal of International Criminal Justice*, 1-20, 17-18.

CHAPTER THREE: INTERNATIONAL SENTENCING AND TRADITIONAL JUSTICE

Section 1: Introduction

In Chapter 2, we saw that the international and traditional procedural paradigms are portrayed as polar opposites. Firstly, because the ICC has a retributive procedural framework while the traditional model has a restorative participatory process. Secondly, the ICC protects an individual notion of human rights, while the traditional model protects communitarian values.[1] The findings expose the need to examine views on the manner in which international sentencing can be made relevant in the local context.

In this Chapter, I examine competing arguments among African and international scholars to bring the traditional restorative process and international criminal justice in harmony with human rights guarantees. The debate fails to resolve the question of melding the two systems because most academic interest is focused on the weaknesses of the traditional model, particularly communitarian values where the normative gap in human rights protections seems more pronounced. In terms of what communitarian values can bring to international sentencing justice there is relatively little research. This is curious given the recent flurry of academic research into transitional justice in Africa, more so since sentencing is the phase where international and traditional procedural systems robustly conflict each other.

Given that the place of human rights has been overlooked by both African and international scholarship, I propose a translation model as a new framework to reconceptualise the two approaches- a judge centred (international) procedural approach with a participatory (traditional) one- grounded in a liberal-communitarian theory of rights. M. Langer's study of translation provides invaluable ideas and insights into structural and doctrinal transformation of procedural law, some of which are adopted here.

Following this introduction, the layout of this chapter is as follows: Section 2 examines the arguments of African scholars, while Section 3 sets out arguments from

[1] Communitarian values namely duty to kin, reconciliation, restitution and the role of ritual are discussed in Ch. 1 S.4 and Ch. 2 S. 2(iii) *op cit*.

international voices and examines proposals for harmonisation. In Section 4, I set out arguments for an application of a liberal-communitarian theory of rights. I affirm my commitment to a translation model in Section 5, and offer a brief conclusion in Section 6.

Section 2: The search for consensus: African voices

African scholars have challenged the superiority of the international procedural model, arguing that the modern (national) and African legal systems cannot co-exist: one system will be subordinate to the other.[2] For example, H. Bisimba, using the examples of the *Sungusungu* and *Ritongo* in Tanzania, provides evidence that local systems can succeed only where the formal system fails.[3] Recent work has moved towards an exploration of which system is superior to the other, based on the divergent normative standards.

Nyaba for instance, condemns western intellectuals for ignoring the African traditional justice system and claiming it cannot change.[4] Moreover, Nabudere contends, there is evidence that national legal systems (based on modern models) are incomprehensible to local communities. For Nabudere, formal systems of justice do not provide solutions that are appropriate to poor people living in 'face to face communities.'[5] Instead, he proposes a new 'humanist' paradigm to be informed by 'the dethroning of the Eurocentric World view through which the Enlightenment had 'dethroned earlier civilisations'. This new paradigm can only happen if there is equality of all peoples and abolition of monopoly over private property. Nabudere argues that the 'African Renaissance' spawning a new research agenda will be built on this new paradigm.[6] In my view, while Nabudere's proposals move the debate further - by giving reasons for equality amongst cultures, normative systems and the possibility of cross fertilization of ideas - they fail to address the structural and doctrinal issues at stake in integration.

[2] *Report on the Regional Conference on Post-traditional Justice and Human Rights* in the appendix of the *East African Journal of Peace and Human Rights* (*EAJPHR*) (2002) 8 (1) *op cit* 29-30 discussing traditional institutions that emerged from weak states.
[3] H. Bisimba, 'Perspectives on Tanzania's non formal systems of justice' (2002) 8 (1) *EAJPHR* 83-96.
[4] P. Nyaba *op cit* 106.
[5] D. Nabudere (2002) *op cit* 1, 21.
[6] *Ibid*, 21-23. Nabudere points to a growing recognition of the fact that new civilization demands that all cultures have equal importance to humanity and one culture readily learns from other cultures.

T. Nahimana's proposals for reform, based on an existing traditional justice process seem less radical and therefore perhaps more likely to succeed. Nahimana argues for the retention of established African legal systems like the Burundi *Bashingantahe* institution. First of all, he points out that the *Bashingantahe* is based on non-negotiable interests which are articulated to form human dignity called *Ubuntu.*[7] Then he argues that *Ubuntu* should be preserved and the *Bashingantahe* procedures modernised, since it is the interface between traditional and formal judicial process. This nexus exists because the *Bashingantahe* use *Intahe* - the 'rule of fairness', governed by principles of equality, truth, and reconciliation. Fairness is ultimately achieved by public consultations and once a settlement proposal is accepted by both sides it becomes as 'binding as a court decision'.[8] Nahimana's description is neither accompanied by a proposal on how the *Bashingantahe* procedures should be modernised, nor coupled with an analysis that points out its weaknesses. But at least the author identifies normative features on which the procedure is built.

There are criticisms of Nahimana's type of arguments from A. Garapon.[9] He argues that the 'universalisation' test for international criminal justice is its capacity to visualise forms of justice other than the Western style trials. He is justifiably concerned about the 'westernising' of tradition. Garapon gives the example of *Ubuntu* being westernised in translation, thereby maintaining an ambiguous culturalism that romanticises the African past. International criminal justice, he maintains, should work as 'reinterpretation' of tradition, aimed at giving new meaning to ancient traditions. Favouring cosmopolitism, Garapon argues for the possibility of intercultural dialogue where the West allows itself to be transformed and learn from societies that are different instead of 'neo-colonialism under the guise of morality.'[10]

I find that all these academic arguments are unable to accommodate the contemporary African criminal justice within the international procedural context. The task has been taken up by those operating outside the formal academy including policy-oriented social scientists. For example, the 3 year *Roco Wait I Acoli* study, documents existing practices of traditional justice in Acoli, so as to provide an assessment of how

[7] T. Nahimana (2002) *op cit* 112-113. He bases his argument on Max-Neef's paradigm of power, law and interests that include procedural interests concerning the way disputes are resolved; who is involved and how decisions are taken.
[8] *Ibid*, 116.
[9] A. Garapon, 'Three Challenges for International Criminal Justice' (2004) 2 (3) *Journal of International Criminal Justice* 716-726.
[10] *Ibid*, 722-724.

the rituals and ceremonies could be adapted to address war crimes. Their findings are important because they reveal the state of the community's social regulatory regime. For instance, the study establishes that Acoli culture is in decline and that clan and other traditional courts have been taken over by the state's local council courts.[11]

Another example is the work of E. Baines: a political scientist whose 2 year research draws on the *Roco Wat I Acoli* report and illustrates the potential and limitations of procedures like *Mato Oput*.[12] Baines posits that international human rights standards can be met, but that it would take 'years of discussion' for traditional mechanisms to be regarded as legitimate from an international perspective. Her single most important contribution as a western author is an acknowledgement that spiritualism is a critical area of reconciliation and reconstruction of the lives of offenders, victim and the community.[13]

Three comments may be made about this body of work. Firstly, the writers all look at the problem from the transitional justice aspect. In other words, they are seeking solutions for conflict in the short term, but are not looking for a long term solution to the problem of reconciling different normative systems. Yet, as Rose and Sekandi argue, the role of the ICC in healing puts it in a strong position to try cases on the African conflict.[14] For that reason, taking traditional restorative justice into account is necessary if the ICC is to achieve domestic validity. Indeed, the danger of forceful transformation of African customary law is the stifling of progressive integration between the traditional and international models. Secondly, there is a dearth of literature on the role of legal doctrine as a tool in integrating procedural rules across systems. The assumption appears to be that the differences are irreconcilable since African jurisprudence is largely oral and presumably subjective. This trend of thought is evidenced by the fact that scholars describe the traditional model as 'informal mechanisms' or 'dispute resolution forums', thereby weakening any doctrinal significance of its jurisprudence. Traditional courts cannot be regarded as courts of record whose decisions could set a ratio decidendi on customary sentencing as

[11] Liu Institute, *Roco Wat I Acoli, op cit* 17-19. Their recommendation is for an independent Commission on reintegration and restoration to be set up to investigate further possibilities of adapting traditional justice ibid, 75. Other examples are T. Allen *op cit* an expert in Development studies and S. Finnstrom a cultural anthropologist: *Living with Bad Surroundings: War and Existential Uncertainty in Acholiland*, Northern Uganda Studies in Cultural Anthropology No. 35 (Uppsala: Uppsala University Press, 2003).
[12] E. Baines op cit 91,103-108. The *Mato Oput* restorative process is discussed in Ch.1 S.1 *op cit.*
[13] *Ibid*, 114.
[14] C. Rose and F. Sekandi, 'The pursuit of transitional justice and African traditional values: a clash of civilisations-the case of Uganda' (2007)1 *International Journal on Human Rights* 101-125,119.

precedent for international courts. However, as Nabudere argues, the failure of the state has fostered the revival of traditional institutions.[15] For that reason, I maintain that their juridical worth needs to be reassessed, and their potential to support international procedural frameworks re-examined. Thirdly, for one to show that a system can change, you need to identify its features that facilitate that change. This is mentioned briefly in Nahimana's description of the *Intahe* model of fairness where the focus is on *shared* features on which the international model could be built.

Overall, I find that the *divergence* in the normative frameworks and procedural approaches between the international and traditional model unfortunately are not reconciled in any of the scholars' paradigms. The scholarship also reveals that there is need for some sort of merger between communitarian values and individual rights. This too is not sought. Rather, as we saw in Chapter 2, the discourse continues to present communitarian values as antithetical to individualistic procedural rights. F. Jjuuko accurately describes this impasse when he says that this is a dilemma of reconciling individual rights with collective rights and responsibilities.[16]

My argument is that human rights are not viewed (but ought to be) as the linchpin by which these divergent normative frameworks can be reconciled. The only study which takes anything like this approach is by Hovil and Quinn in which, focussing on Acoli customs, they attempt to reconcile customary procedures generally with international procedural rights in Article 14 ICCPR.[17] The report acknowledges potential difficulties in using traditional mechanisms to achieve justice, in particular where the procedural rules are 'imprecise, unwritten, democratic, flexible, ad hoc and pluralistic'.[18] Nevertheless, not much attention is paid to whether such procedural 'rules' could be strengthened to achieve appropriate justice based on fairness. Rather, the conclusions suggest that Acoli traditional practices meet the conditions of Article 14 ICCPR. The authors claim that the Acoli traditional system ensures among others:

[15] D. Nabudere *op cit* 27.
[16] F. Jjuuko cited in *Report of the Regional Conference on Post-Traditional Justice*, *EAJPHR* (2002) *op cit* 125-126.
[17] L. Hovil and J. R Quinn, *Peace First, Justice Later: Traditional justice in Northern Uganda,* Refugee Law Project Working Paper No.17 (July 2005) Para 6.3 pages 40-45.
[18] *Ibid*, para 6.3 page 40, notes 160-162 where they draw on the work of R. K Abel (ed.), *The Politics of Informal Justice* Vol. 2 (New York: Academic Press, 1982) 2.

equality, protection against undue delay, presence at trial, right to confront witnesses, the language of choice and a guaranteed promotion of rehabilitation.[19]

I find the evidence on which this conclusion is drawn far from satisfactory because it is based on an interview with only one person, an executive secretary of the traditional elders association called *Kwer Kwaro Acoli*. Additionally, these conclusions are not the product of a legal analysis of the interplay between communitarian values and individual rights between the two models. Rather, Hovil and Quinn merely look for similarities between the two. In doing so, they too fail to discuss the manner in which individual rights may be 'abridged' by social responsibilities, or how spiritualism could override rational thought and therefore erode individual autonomy.

Section 3: International voices-the universality of international criminal procedure

International law apologists continue to have the dominant voice on the universality and (superiority) of international criminal procedure. For example David Crane, a former Prosecutor to the SCSL, opined that:

> 'Though *we cannot*, nor would I even suggest otherwise, *substitute customary approaches* for our international criminal procedures, practitioners should still seek ways to ensure that the victims, … and populace have a sense that what is being done is just and to the extent it will mesh with custom and culture so much the better. In West Africa we did not want this to seem as *white man's justice*, a charge that the indictees levelled at us from time to time.'[20]

Crane is one of the few western scholars who have voiced his concern about African procedures being *part* of international procedure. Some dominant voices like Richard Goldstone insist on the supremacy of international criminal law in punishing leaders and those in superior positions, for international crimes.[21] Others like Schabas respond to Oko's criticisms that criminal prosecutions at international tribunals are a western intrusion in African accountability mechanisms. Oko insists that such prosecutions do

[19] *Ibid*, 42. The authors assert that Acoli practices meet other conditions of Article 14 (1) (2) (3) a-g, (5) ICCPR like the presumption of innocence, full disclosure of charges and accusations, adequate preparation time, and prohibition of self incrimination.

[20] D. Crane, former prosecutor to the SCSL: Discussion Topic 12 "Whose Justice Anyway?" *Grotian Moment Blog* at http://www.law.case.edu/saddamtrial, 55-56, 10th October 2005, visited on 12/10/2005. Emphasis is mine.

[21] R. Goldstone, 'The International Tribunal For The Former Yugoslavia: A Case Study In Security Council Action' (1995) 6 *Duke Journal of Comparative and International Law*, 5-10, 8-10. Goldstone was former Chief prosecutor at the ICTY and ICTR.

not automatically translate into respect for human rights.[22] In response, Schabas maintains that international legal obligations require prosecution and punishment of perpetrators of serious violations of human rights violations.[23] Yet others are concerned with the lack of procedural guarantees in traditional courts for the offenders. As we saw in Chapter 1, Ugandan academic M. Senyonjo argues that *Mato Oput* is not an alternative to the ICC because it does not afford due process rights to the offender.[24] What's more, organisations like Amnesty International interpret Article 14(1) ICCPR as excluding the jurisdiction of traditional justice mechanisms (including clan courts). These mechanisms, they argue can only supplement but do not replace the national criminal justice process.[25]

These interrelated positions adopted by international lawyers fail to address a central concern. This is that the international procedural system and its values are predicated on a predominance of modern normative systems – a hybridization of common law and civil law – that is alien to affected populations.[26] By not considering what neo-traditional normative systems have to offer, these voices imply that international procedure is static and incapable of adopting other normative standards. I am fully aware of the distinctive problems posed for the individual, particularly the neglect of protection of due process in traditional restorative justice. Some of these problems are well covered in Chapter 2. The objectors' concerns, however, are much more likely to be addressed satisfactorily if we actually explored the potential for a blending of international and customary law through the translation process I advocate.

The assumption of procedural superiority in the international normative and human rights framework has nonetheless resulted in an impasse that seems to have influenced academic discourses on international sentencing. For example, Safferling has strenuously argued that the two stages of sentencing procedure under common law should be adhered to. That way, procedural rights and interests are balanced. He refers to the protection of the defendant's right to privacy, the pre-emption of negative

[22] O. Oko, 'Confronting Transgressions of Prior Military Regimes: Towards a More Pragmatic Approach' (2003) 11 *Cardozo Journal of International and Comparative Law* 89-142, 99. Oko prefers truth and reconciliation commissions.
[23] W. A. Schabas rejects Oko's arguments in 'Conjoined Twins of Transitional Justice-The Sierra Leone Truth and Reconciliation Commission and the Special Court' (2004) 2 (4) *Journal of International Criminal Justice*, 1082-1099, 1083.
[24] M. Senyonjo (2007) *op cit* 64-65 referred to in Ch.1 S.1 *op cit.*
[25] Amnesty International (2008) *op cit* 19-20, criticising the June 2007 Agreement and its 2008 Annexure for attempting to use traditional justice to replace the criminal justice process: Chapter 1, S.1 *op cit*.
[26] M. Drumbl *op cit* 128.

inferences about guilt, and the protection of the public.[27] Such writings clearly do not envisage imports from any other procedural system. Yet some may argue that since the ICC is itself a hybrid procedural model, it ought to be accommodative to other normative standards.

Some of the international literature has proposed that the ICC should defer to the traditional restorative justice model. Within the context of transitional justice, some like L. Keller propose a theoretical framework to guide the ICC in evaluating local alternatives applicable to any case that may involve a negotiated settlement in an ongoing conflict.[28] She proposes that the ICC defer to local restorative justice systems because, in her view, *Mato Oput* is capable of achieving reconciliation and restitution on a local level.[29] Others like J. Quinn urge that traditional institutions be promoted to resolve conflict as they provide an alternative means to dealing with post conflict problems.[30]

From the foregoing discussion, even these 'moderate' international scholars do not adequately address one important question. That is whether international criminal courts could draw lessons from local processes to make sentencing outcomes acceptable in the customary African context, without undermining something important about the status of international law. Countering the internationalist voices, a growing number of academics suggest that accommodating traditional justice norms may be more effective in achieving international procedural legitimacy. For example J. Cockayne argues that an ICC process that permits local procedural norms to factor into international trials might not only have increased chances of legitimacy in localised communities, but also play a significant role in developing comparative criminal procedural jurisprudence.[31] I agree with Cockayne's view because it reflects the need to locate traditional restorative justice in both the ICC procedural model and the international human rights framework at a theoretical level. The merits of this are to enable the ICC to offer a dialogic encounter between victims, offenders and the

[27] C. Safferling *op cit*, 268-272; 371-372.
[28] L. M Keller, 'Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms' (2008) 23 *Connecticut Journal of International Law* 209-279, 211-212.
[29] *Ibid*, 275-278. J. I Turner, 'Nationalising International Criminal Law: The International Criminal Court as a Roving Mixed Court', (2005) 41 *Stanford Journal of International Law* 1-52 calls for a less hierarchical ICC that relies on national governments: a sort of 'roving mixed court.'
[30] J. R Quinn, 'Social Reconstruction in Uganda: the Role of Customary Mechanisms in Transitional Justice' (2007) *Human Rights Review* 389-407, 401-402.
[31] J. Cockayne, "Report on the International Conference, From a Culture of Immunity to a culture of Accountability: International Criminal Tribunals" the International Court and Human Rights Protections, University of Utretcht, Dec. 2001 page 20, cited in R. Henham (2004) *op cit* 210.

community. This encounter would in turn promote a wider construct of procedural rights. This is only possible if procedural rights become a kind of normative bridge between the aims of international justice and the values of localized communities.

So far there are three proposals. Apuuli's integrated transitional justice model proposes a combined use of the adversarial, inquisitorial and 'popular justice' (Gacaca) systems. During the trial, rights of the accused, victim and 'affected population' would be protected. The judgement would take into account victim's interests like awarding compensation. Apuuli suggests that rights of the population could include access to the proceedings.[32] In my view, although this model addresses integration at a national and international level, it does not address two questions. These are: whether access to proceedings includes participatory 'rights' for all parties during sentencing; and if so how human rights could be used as a normative bridge between Apuuli's 'combined' procedural systems.

The second proposal is by Findlay and Henham. They propose a retributive-restorative justice ICC model, based on wider discretion for the judge who is crucial to trial transformation. Restorative justice, they argue, is conceived clearly in the ICC during the pre-trial and post trial stage in the form of participatory rights of the victim, their right to information, consultation and legal representation. Thus, integrating restorative justice involves more than just expanding the range of sentencing options to the judge, but transforming power and authority between parties.[33] They view the trial as a model for inclusive aspirations of international criminal justice within a human rights framework, while acknowledging the challenge of combining restorative and retributive agendas.[34] The authors caution that conflicting interests will worsen in such conflation of trial frameworks. For them:

> 'The answer to this is not to degenerate the 'rights basis' of the trial into some relativist confusion but rather to incorporate an expanded notion of individual and collective rights centrally within a new normative framework for international criminal trials which better accommodates both paradigms of international criminal justice.'[35]

Despite putting forth these arguments to prevent a slide towards 'relativist confusion', the authors fall short of properly developing their concept of integrating an

[32] K. Apuuli, Unpublished Thesis (2006) *op cit* 205-206.
[33] M. Findlay and R. Henham *op cit*, 284-285 citing D. Van Ness 'Restorative Justice: International trends' (1998 at 7).
[34] *Ibid*, 306.
[35] *Ibid*, 331.The two paradigms referred to here are the retributive and restorative paradigms.

expanded notion of individual and collective rights within international criminal procedure. The authors observe that though international criminal courts are meant for communities in post conflict states, these very communities seem to avoid international trials in favour of their own types of justice.[36] They acknowledge that where the formal state system is limited in its coverage, then indigenous justice is likely to retain its integrity. Therefore formal justice requires the legitimacy of indigenous (traditional) justice and is tied to its context and purpose. The Kony saga is an example where the Uganda government seeks the legitimacy of a traditional justice mechanism to try to achieve collaboration through the June Agreement in order to broker a peace agreement.[37] The authors conclude that international criminal justice should collaborate with the traditional and the state, in order to achieve restorative justice.[38] While this inter-relationship is not in doubt, the authors do not deal directly with *how* to reconcile incompatible aspects of the two frameworks in a way that could reduce incidences of communities avoiding trials under international justice.

Findlay and Henham's proposal does not draw from the traditional normative system, presumably to avoid 'relativist confusion'. This is evident in their methodology. For instance, their work, though based on social theory, draws on empirical research from Italy and England. Experiences from these countries, especially England, are relevant to the extent that international criminal procedure comprises in part the English legal system. However, there are unique features of traditional African restorative justice that are not explored or discussed in the book, like the belief in mysticism as *part* of the sentence. Besides, their proposals neglect issues of the supernatural and rituals that are part of traditional sentencing process. Furthermore, there is no mention of how the ICC could achieve local procedural justice by borrowing from traditional systems themselves. By contrast, I maintain that to harmonise competing interests, accommodating traditional participatory procedures and communitarian values using an expanded notion of rights, is inevitable at some stage.

A third equally relevant proposal is by M. Drumbl who adopts a sociological critique of the purposes of the substantive law of international punishment. He criticises

[36] *Ibid*, 337.
[37] Ch. 1 S. 1 *op cit*.
[38] M. Findlay and R. Henham *op cit* 337-338. The authors propose judicial collaboration in transformed trials that use formal state institutions to join community centred justice initiatives. They give the example of collaboration between the state sponsored institutions and community centred initiatives like restorative juvenile justice in England where the juvenile crime is handled under the patronage of the police in a restorative setting: citing M. Findlay (1997 at 145).

international institutions for assuming that 'formulaic' reliance on due process standards alone will lead to legitimacy among populations transitioning from conflict.[39] He is dismissive of a process merely because it has become globalised and thereby assumes its own legitimacy and effectiveness. By this, Drumbl refers to international human rights instruments. At the same time, he rejects the input of local practices, asserting that there is 'little advantage in venerating the local (…) simply to promote pluralistic difference as an end in itself.' Local punishment schemes, because of their communitarian nature he contends, may be prone to manipulation or abuse.[40] Despite his misgivings, Drumbl urges international lawyers to accommodate the potential of the local practices, suggesting that the process of accountability should focus on acknowledgement of responsibility, reconciliation and reconstruction of social norms.[41] He then proposes a vertical bottom-up approach based on cosmopolitan pluralism model, where local justice systems are granted a presumption of deference subject to interpretive guidelines. Cosmopolitan pluralism supports censure at the global level while incorporating local control, process and sanction.[42]

Drumbl's most important contribution is his extensive analysis of the problems of transplantation at the national and international level. He calls this 'Legal Mimicry'. He argues that there is no guarantee that international criminal tribunals will be legitimatised among the local communities. This is because of 'externalisation of justice' where punishment and processes of punishment are considered alien from that of the local population.[43] For instance, indigenous East Timorese view imprisonment as an 'alien' punishment because their traditional justice system emphasises compensation, restoration and ritual.[44] Drumbl also relies on research findings where Rwandese people complained that the ICTR trials were held far away; used 'western-style' judicial practices with emphasis on procedure, while giving minimal thought to local Rwandese adjudication process.[45]

[39] M. Drumbl *op cit* at 7.
[40] *Ibid*, 13-14.
[41] *Ibid*, 98-99.
[42] *Ibid*, Ch. 7, especially 185-194. The interpretative guidelines are: good faith; democratic legitimacy of the procedural rules in question; specific characteristics of the violence and political context; avoidance of iterated punishment; procedural methods should not void the substantive content of universal values; and prohibiting infliction of great evil on others: 190-191.
[43] *Ibid*, 127-133, 145.
[44] *Ibid*, at 129 citing the findings of N. A Combs in East Timor (2006).
[45] *Ibid*, 133 notes 45 and 46; citing research by Allison Des Forges and T. Longman 'Legal Responses to Genocide in Rwanda' (2002).

Despite his excellent appraisal of the legal crisis, Drumbl's thesis has several shortcomings. First, he does not deal with sole judicial discretion in sentencing as a structural feature that is incompatible with traditional process. Secondly, procedural rights are mentioned briefly - they are not built into his theory, unlike Findlay and Henham who attempt to discuss it. Thirdly, though he delves extensively into the practices of Gacaca courts under Rwanda's Organic Law, Drumbl's approach only gives one side of the argument: namely how the state may use traditional justice as a tool of social control and distort it. It leaves open the question of whether human rights could become a normative bridge between the opposing paradigms. Such an approach also aggregates traditional communities thereby missing the lessons from the micro level applications of traditional justice operating *outside* national legal frameworks.

Yet as I show in Chapters 6 and 7 of the thesis, the interpretation and application of modern law by local communities gives salutary lessons on harmonising divergent normative standards. As Benda-Beckmann's empirical argument shows, such interpretations and applications attract little comment because this process takes place outside frameworks regarded as legal for state or 'western' law application. Most analyses tend to focus on issues where social life and adjudication is governed by customary law under a national legal system.[46] For example, recent academic studies in Uganda are those of the state-governed local council courts that apply only national penal laws using limited traditional processes.[47] Yet, as Barya and Onyango point out, the local council courts were not created in an attempt to revert to traditions, but only to provide a semblance of a traditional approach to judicial power.[48] Therefore, the legislative framework of the local council courts does not reflect all aspects of communitarian values in a traditional restorative justice context.[49]

[46] F. von Benda-Beckmann, 'Law out of context: A comment on the creation of Traditional Law discussion' (1984) 28 (1&2) *Journal of African Law* 28-33, 31-32.

[47] J. Barya and J. Oloka-Onyango, *Popular Justice and Resistance Committee courts in Uganda* (Kampala: New Vision Printing and Publishing Corporation, 1994); L. Khadiagala, 'The failure of popular justice in Uganda: Local councils and women's property rights' (2001) 32 (1) *Development and Change* 55-76; B. Baker, 'Popular justice and policing from bush war to democracy: Uganda 1981-2004' (2004) 32 (4) *International Journal of Sociology of Law* 333-348, and Nordic Consulting Group, *Survey of LC Courts and Legal Aid Providers Findings: Tororo district* (Kampala: Nordic Consulting Group, 2006) and L. T Ekirikubinza, 'Juvenile Justice and the Law in Uganda: Towards Restorative Justice' in Lindholt and Schaumburg-Muller (eds.) *Human Rights in Development Yearbook 2003: Human Rights and Local/Living Law* (Leiden, Boston: Martinus Nijhoff Publishers, 2005) 295-346.

[48] J. Barya and J. Oloka-Onyango *op cit* 46.

[49] For instance, the Local Council Courts Act 13/2006 mirrors national law by excluding the participatory rights of the community to deliberate sentence. Deliberation of sentence is done solely by the court officials under S. 8 (9). Also there are no provisions on rituals for reconciliation, restitution and purification.

The foregoing review of academic scholarship highlights the challenges of finding legal ways to bring conflicting procedural systems into harmony with international procedural guarantees. For that reason there is much to learn about traditional normative frameworks to understand whether such harmonisation is possible. I contend that a liberal- communitarian theory is the starting point to the search for a workable solution. I take this up in the next section.

Section 4: The Liberal-Communitarian theory

A compelling reason for the ICC to use a liberal-communitarian theory to bring conflicting systems in harmony with procedural guarantees is as follows. Liberalism focuses on enactment of laws to protect the rights and freedoms of individuals, while communitarianism builds on empathy and altruistic feeling.[50] However, liberal theory provides procedural safeguards to prevent any abuse of communitarian power by injecting liberalism through the procedural rules of trial. It is through such safeguards that one can prevent for example, discriminatory practices in such communitarian traditions.

In this regard, the Regional Conference on Post-traditional Justice and Human Rights identified as a weakness of the African customary system, its inability to integrate equality of sexes and individual autonomy.[51] To this end Nabudere's suggestion of a reconciliation of the individualisation of rights and liabilities with the traditional system of collective rights and responsibilities is apt. He posits that owing to the dynamism of traditional social relations, it might be desirable to 'import individual liability into the traditional system' to fill in the gaps.[52] Nabudere's proposition, however, is general and not specific to the procedural mechanisms and rights.

R. Howard goes further, stressing that the notion of communitarian rights can accommodate individual rights. It would be a denial of social justice for Africans to fail to get protection of human rights against both the state and other members of society due to fear of individualism.[53] In adopting her argument, I suggest that communitarian 'rights' could be made part of the genre of procedural rights by incorporating

[50] D. A Masolo, 'Western and African Communitarianism: A comparison' in K. Wiredu (ed.) *A Companion to African Philosophy* (Malden, MA: Blackwell Publishing Company, 2004) 494.
[51] *Report of the Conference* in *EAJPHR* (2002) *op cit* 29-30.
[52] D. Nabudere *op cit* at 126–plenary discussion. He identifies this area of human rights as one in need of further research.
[53] R. Howard *op cit* 182-183.

communitarian values where they resonate with individual rights. This would form the basis of the normative bridge between the two systems. I will use a worked example of the right to a public hearing, to make this connection.

A liberal like Alexy or Gerwith would view procedural safeguards as positive rights that are fulfilled only when the court performs its duty.[54] The duty of court would be to prevent any interference with an individual's right to a public hearing. The right must be provided in enacted law, not set out in oral laws. Further, in considering any communitarian interests that are provided in law ('balancing'), Ashworth would caution that greater weight be put on protecting individual rights, not competing interests of the community.[55] To this end, S. Greer's work on the European Court of Human Rights (ECtHR) is instructive. Greer would suggest a 'structural balancing' of 'priority-to-rights principles' in which the court determines whether a competing communal goal should override a right, based on legislative (or Convention) provisions.[56] Priority-to-rights principles are apparent in procedural safeguards like the right to a public hearing. Any restrictions to this right, a liberal would argue, must among others, be permitted by law, be in the public interest and restrict the right only in so far as is necessary in the circumstances.[57]

An African communitarian like Cobbah, would view the right to a public hearing as inviolable under traditional oral laws. The right is protected by communitarian values, underpinned by group rights where entitlements and obligations form the basis of the kinship system.[58] Therefore an individual's entitlement to a public hearing is reciprocated by his or her duty to enforce communitarian interests. Even where the individual carries out their social obligations to the community, this does not elevate protection of the individual. Rather, the individual is protected by the group; say the clan. The clan achieve the individual's *entitlement* to a public hearing, by participating in all aspects of the trial, including the deliberation of sentence, to ensure

[54] A. Gerwith *op cit* 219: a right is fulfilled when a correlative duty or action is accomplished. R. Alexy *op cit* at 326.
[55] A. Ashworth, *Human Rights, Serious Crime and Criminal Procedure* (London: Sweet and Maxwell, 2002) 56-64 discussing Article 6 of the ECHR on the right to a fair trial.
[56] S. Greer *op cit* 196 defines the principle of priority-to-rights as one that mediates the relationship between rights and democracy principles. Priority-to-rights integrates the principle of legality, procedural fairness and the rule of law that subjects public authority to legal constraints to eschew arbitrariness: 201.
[57] *Ibid,* 208-209, 212-213 and 253-255. Greer gives the example of *in camera* proceedings that restrict the right to a public trial: 254-255 citing decisions of the ECtHR like *Diennet v France* (1995) 21 EHRR 554 at 34.
[58] J. Cobbah *op cit* 320-321.

a fair outcome for their kin. Hence, communal decision making by one's kin, prevents any interference with the individual's 'right' to a public hearing.

A liberal-communitarian would attempt to blend these rights together. Crucially, they would consider the need for individual procedural safeguards, but would also acknowledge that individual entitlements form part of community interests. To this end, M. Bayle's 'inherent due process' approach based on principles of participation and fairness, may help bridge the gap.[59] Under the principle of participation, all parties are heard before decisions affecting them are made. Their participation must be meaningful in the resolution of legal disputes because such parties who have participated will most likely accept the decision. Under the principle of fairness, all parties are treated justly, and individuals have an equal opportunity to participate,[60] which arguably protects the right to a public hearing.

A theory I find workable is An-N`aim's cross cultural dialogue, based on the principle of reciprocity.[61] Reciprocity defines the criteria by which a given practice may be judged inhumane or objectionable: that one would not tolerate for another, any treatment they themselves would not accept. An-N`aim's argument for cross cultural dialogue has as its starting point a common denominator among all traditions: the inherent dignity and integrity of individuals. He uses this common denominator to gain legitimacy for protection of rights in all cultures. If the internal re-interpretation (where the community interpret rights in their own context) of the common denominator fails, then an appeal may be made to external standards like international human rights. An-Na`im and F. Deng stress that local cultural values may be relied upon to check the leaders who shelter behind cultural relativism while violating citizen's human rights.[62] Then again, local systems share some norms with international models. So if the right to public hearing is viewed as a common denominator by both the community and international body, then cross cultural dialogue between the two models is feasible.

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[59] M. Bayles, 'Principles for Legal Procedure' (1986) 5 *Law and Philosophy* 33-57, 54-55. Although the principles were defined for mainly civil procedure they can be adapted for use in criminal matters because they have the flexibility necessary for a cross cultural dialogue. Bayles argues that the benefits of procedure are independent of their effect on the accuracy of outcomes.

[60] *Ibid*, 54-55. Sub principles relate to principles of natural justice such as: both sides should present their story, court should not to be biased and each side should be aware of the information presented against them.

[61] A. A An-Na`im, 'Problems of Universal Cultural Legitimacy' in A. A An-Na`im and F. Deng (eds.), (1990) *op cit*, 344-345.

[62] *Ibid*, Chapter 1 where the authors also restate the position that human rights are viewed as individualistic as contrasted with the African concept of communal or collective rights in which the rights of an individual are not above those of the community.

In summary, the liberal communitarian framework answers the first question in this thesis in the affirmative. It is possible for the ICC to adopt a theoretical model that attempts to reconcile international procedural law with the values of localized communities to help prevent offenders like Kony escaping liability on a long term basis. I note that some liberals and some communitarians would regard the liberal-communitarian solution as unattractive. Still, this is perhaps the best way forward given the context of the ICC, which necessarily must operate in a way which brings different legal systems, and philosophical ideas, into close contact with one another. In other words, the melding of different positions seems particularly appropriate for such a body. I discuss this in section 5 below.

Section 5: The Translation Theoretical model

In this section, I illustrate how my argument moves the debate forward. I argue that the concept of translation could be used to apply a liberal-communitarian theory of rights using Bayle's principle of participation and fairness and An- Na`im's cross cultural dialogue. To do so, I suggest that distinctive procedural features are identified, and then legal ideas (norms) are transferred using judicial precedent as a doctrinal tool of legal interpretation. I outline the reasons for my rejection of transplantation and affirm my commitment to a model of translation with a focus on M. Langer's work.

The problem with the present transplantation[63] or 'importation' of international law must be underscored. Drumbl gives a persuasive analysis of this problem. His seminal work scrutinises legal transplants from international criminal institutions, giving an excellent assessment of why legal transplants are of concern in contemporary times. Firstly, local populations may not always see international law as legitimate even if it is viewed as such through 'intergenerational socialisation'. Secondly, international sentencing frameworks fall short of their aspirations namely the aims and purpose of punishment. Drumbl's most compelling argument, as we saw in Chapter 1, is that the international sentencing framework represents 'externalisation of justice'. Here, 'liberal' criminal procedures are 'mapped' onto cultural diverse

[63] Legal transplants were popularised by A. Watson, *Legal Transplants: An Approach to Comparative Law* (Edinburgh: Scottish Academic Press, 1974 reprinted 1993) who analysed the international transfer, borrowing and imposition of legal rules, using comparative methods.

frameworks without consideration to local values.[64] The outcome is a procedure that is alien to the local population and therefore does not resonate with their notions of procedural justice.

Another problem is that transmigration of laws involves adaptation or *transposition* to the condition of recipient countries.[65] This is achieved by a process known as 'tuning' that aims to bridge the conceptual and analytical framework of law and the theories of convergence and divergence.[66] The outcome is a new *ius* commune.[67] Although the transplantation theory may be a useful analytical tool of comparative law, the vagaries of transplantation cannot, in my view, be dealt with through tuning alone. M. Langer rightly criticises the transplantation metaphor as inadequate to account for the transformation of structural features and legal ideas within institutions undergoing the transplantation process, leaving the effect of a 'copy and paste model'.[68]

Take the example of Uganda's ICC Bill of 2006. Its objective is to give the force of law to the Rome Statute in Uganda.[69] Under Clause 64, Ugandan courts may enforce reparation orders made under the Rome Statute using the Trial on Indictments Act (TIA). The TIA is itself a transplant of the 1951 Criminal Procedure Code based on procedure of the English Assize courts.[70] The TIA reparation procedure thus depicts the phenomenon of a 'copy and paste' model whose outcome is predictably 'externalisation of justice'. Clause 64 (2) (a) provides that where an order for monetary payment to the victim is made under Article 75 of the Rome Statute, the order shall be enforced as if it were a sentence for compensation under Section 126 of the TIA. Under Section 126 (1) TIA, if there is evidence that any person has suffered 'material loss or personal injury,' the High Court may order the convicted person to pay compensation as the court deems

[64] M. Drumbl *op cit* Chapter 5 especially 126-138.
[65] G. Ajani, 'The role of Comparative law in the adoption of new codifications' in *Italian National reports to the XVT International Congress of Comparative Law*, Bristol 1998 (Milano: Giuffre Editore, 1998) 70.
[66] E. Orucu, 'Law as Transposition' (2002) 51 (2) *International and Comparative Law Quarterly* 205-233, 221-223 and G. Teubner 'Legal Irritants: Good faith in British Law or how unifying law ends up in new divergences' (1998) 61 (1) *Modern Law Review* 11-32. Others include: L. A Mistelis, 'Regulatory Aspects: Globalization, Harmonisation, Legal Transplants and Law Reform-Some Fundamental Observations (2000) 34 *International Law* 1055-1069; F. Schauer, 'The Politics and Incentives of Legal Transplantation' in J. S Nye and J. D Donahue (eds.) *Governance in a Globalizing World* (Washington, D.C: Brookings Institution, 2000).
[67] E. Orucu *op cit*, 206. *Ius Commune* is part of the study of refining the legal transplant theory by replacing the concept of legal transplant with legal transposition so as to bring the laws in harmony.
[68] M. Langer, (2004) *op cit* 5, 30-32.
[69] Memorandum and clause 2 (a) of the Bill discussed in Ch.1 S.2 (ii) *op cit*.
[70] H. Morris and J. Read *op cit* 264 and Ch. 1 S. 5 *op cit* and Ch. 8 *infra*.

fair and reasonable. In Section 127 (2), if a person defaults in payments, then a warrant of distress may be issued. In default of the warrant then the person may be sentenced to imprisonment.

Three issues arise. Firstly, determination of compensation is solely at the discretion of the court and is not subject to deliberation by parties, their kin and the community. Secondly, ordering compensation in cash only, excludes traditional forms of compensation for murder like payment of cows or sheep. Crucially, it fails to consider that compensation may comprise what Michalowski describes as 'ritual satisfaction'.[71] Traditionally, no compensation or reparation is complete without a 'ceremonial purge' else both offender and the community are in danger of spiritual retribution.[72] This means that enforcement ought to take into account the rituals following compensation, namely purification and reconciliation. Thirdly, imprisonment in default of payment fails to include the community who could pay the compensation on behalf of their errant kin. Excluding the community in payment of compensation, ignores core communal values based on reciprocal obligation toward each other (duty of kin).[73] This point is taken up in Chapters 6 and 7. I will only make the point here that compensation under the traditional model is viewed as the responsibility of the individual's kin, who assume liability for any wrong doing on behalf of the group.

Transplantation in such contexts is equivalent to standardisation of traditional restorative justice using a hybrid of common and civil law systems that embodies centrality of judicial discretion in sentencing. The danger of standardisation is to de-legitimise indigenous social justice structures and impose a foreign procedural culture. This judicially inherited culture is strongly advocated against by international criminal lawyers who want reform. To this end, some suggest that hybrid tribunals and the ICC will have to depart from the conservative procedural approach adopted by the ICTY.[74] I suggest that for such departure to make international sentencing appropriate to local communities, the ICC should take into account the peculiarities of traditional restorative justice as applied by traditional courts.

To this end, in my quest to analyse the transfer of structural features and ideas between procedural systems, my thesis is influenced by Langer's translation metaphor

[71] R. Michalowski cited in O. Elechi (2006) *op cit,* 19.
[72] J. Driberg (1934) *op cit* 328.
[73] K. Gyekye (1996) *op cit* 35.
[74] G. Nice *op cit* 358, 380. The ICTY is the forerunner of contemporary international criminal tribunals.

as a more adaptable heuristic device.[75] In translation, procedural models (institutions) and legal norms or rules (ideas) are transformed through assimilation or *borrowing* of different concepts and theories from the 'other' and melding them together. Translation takes into account changes effected during the transposition of legal frameworks from one procedural model to another. This means structural features of local institutions and local ideas of justice of the recipient country are drawn upon in order to take into consideration the values of localized communities.

Let me explain the two aspects of translation. The first deals with structural transformations that occur when distinctive institutional features are transferred from one model to the next. Changes are effected through the disposition or procedural approach of key actors within the receiving model. Disposition of key actors- judicial officials, is nurtured through a 'socialisation' process in legal training. Thus, the officials are predisposed to understand criminal procedure and their roles in a certain way. Any changes in their procedural approach and during transfer of norms from one procedural system to another are thus seen as translations effected through decisions taken by 'translators' (legal reformers or judges). [76]

Structural transformations under the translation model may occur as follows. A judge's approach to sentencing is based firstly on sole judicial discretion over the sentencing process. Additionally, a judge's approach to sentencing is to adhere to the principles of legality-namely to apply only written penal law. This excludes an oral legal tradition (narrative). Furthermore, the role of supernaturalism in the international sentencing process is unknown. Yet all these features that are peculiar to African customary law will arguably be lost in transplantation. Thus, in a traditional context where decision making is done communally, sole judicial determination of sentence may seem arbitrary to the community. Also, the meaning of specific sentences within communities and the 'extraneous' factors that they consider vital in sentencing, may be lost if the court fails to consider oral narrative as a valid source of information during trials.[77] Besides, a sentencing process that excludes supernatural processes, like the

[75] M. Langer *op cit* 33-35.

[76] *Ibid*, 10-14. Although Langer's article refers specifically to plea bargaining (pages 35-62), his metaphor of translation arguably applies to all aspects of procedural law because of its measure of elasticity. As I explained in Ch.1 S.4 *op cit*, procedural powers or functions of judicial officials are another aspect of translation. However, since procedural powers are fixed under the Rome Statute, I investigate disposition of judges, where minor adjustments may arguably be made without infringing on statutory procedural powers.

[77] This is exemplified in *J. P. Akayesu v Prosecutor* ICTR-96-4-A Judgement of 1st June 2001, discussed in Ch. 4 S. 3 *infra*.

Mato Oput outlined in Chapter 1, appears to ignore social practices and beliefs are pivotal to reconciliation between parties and the community.

The second aspect of translation takes into account the transformation to structures of interpretation and meaning, where concepts may exist in one procedural language and not the other.[78] For instance, the meaning of 'rights' as we have seen, differ in the liberal and communitarian contexts. In borrowing Langer's metaphor of translation, I adjust it to include the doctrine of judicial precedent because this is one method by which the translators (judges) interpret legal ideas, or explain how a procedural rule or system ought to work. For example, the Pre Trial Chamber 1 in *Situation in the Democratic Republic of Congo*[79] relied on precedent of the ECtHR and the Inter-American Court of Human Rights (IACtHR), in arriving at its decision that victims can participate in the investigation stage of the trial.[80] This case shows how the judges transferred a legal idea of victim participation using judicial precedent from regional courts, to international criminal procedure.

The concept of translation is therefore appropriate only if the procedural features and structure of interpretation can be adjusted to accommodate divergent procedural norms or notion of rights. Likewise, the new concept may need modification. As Ejidike in his study of human rights among the Igbo correctly surmises, 'No culture can be transplanted in its pure form without alteration in another cultural environment.'[81] My theoretical framework will be useful in answering the second question in this thesis on how to modify ('Africanise') international sentencing practice, for three reasons.

Firstly, translation provides terms of reference in comparing differences between the international and traditional justice model and thereby evaluating whether the international can borrow from the traditional. Secondly, translation facilitates analysis of the transformations that could take place when procedural approaches and ideas are transferred from one model to the next. The transfer can be understood as translation because the structural differences are taken into account and mitigated,

[78] M. Langer *op cit* 10.
[79] *Situation in the Democratic Republic of Congo* ICC-01/04-101-tEN-Corr of 17 January 2006 discussed in Cap 2 S. (v) *op cit*.
[80] *Ibid* paras 51-53: citing for example in ECHR *Moreira de Azevdo v. Portugal* 'Judgement' 23 October 1990 Series 241-A and ECtHR Grand Chamber *Perez v. France*, 'Judgement'12 February 2004 Application No47287/99; IACtHR *Blake v. Guatemala* 'Judgment', 24 January 1998, Series C No. 36.
[81] O. M Ejidike, 'Human Rights in the Cultural Traditions and Social Practice of the Igbo of South-Eastern Nigeria' (1999) 43 *Journal of African Law* 71-98, 73.

drawing on the manner in which the community itself handles such difference. Any similarities are highlighted as common concepts that cement the two systems. Thirdly, translation involves rethinking the principles that govern legal ideas, particularly procedural rights as the bedrock of the sentencing process.

I am aware of obvious objections to be raised at such attempts at accommodating traditional features. To illustrate: in the previous section, we saw how Findlay and Henham warn against relativist confusion; and Drumbl cautions against unqualified veneration of the local processes. Such assimilation may arguably serve to entrench collective rights to the disadvantage of individual autonomy and equality. Another objection is that such reconciliation may lead to differential sentencing outcomes arising from a relativist context in which the law is applied. A third objection could be proffered, that adopting such a translation approach is surrendering to the traditional, that will lead to lesser protection of rights in some instances. However, I counter these objections through a worked example of my translation model in Chapter 9, in which I show what minor changes the ICC could make, while drawing from local experiences. Additionally, I show how human rights guarantees will provide the yardstick by which the proposed pluralist framework would operate, particularly since both international and traditional models currently lack sufficient procedural rights guarantees during sentencing.

I posit that assimilating traditional features requires the creation of three phases during sentencing. The finding of guilt in Article 65 and 76 (1) Rome Statute is the first phase. The second phase is the sentencing hearings and the deliberation of sentence in Articles 76 (2)(3) and 78(1). The third phase of purification and reconciliation rituals follows thereafter. The outcome of such an approach would be a pluralist sentencing framework.

To achieve such a model, we must recognise Bayle's principle of participation and fairness; and An_Na`im's principle of reciprocity as concomitant with that of equality of arms. This recognition is necessary if the sentencing outcome is to accommodate African customary processes. Both principles in themselves are nevertheless insufficient for international procedure, for they do not provide a yardstick by which sentencing decisions ought to be determined. Their value is in fostering cross cultural dialogue at a more general level. Therefore a third principle is needed - a notion of *Ubuntu*. I am convinced that excluding *Ubuntu* principles from the procedural narrative arguably, is a denial of an opportunity to be part of social justice. To deny

participation within an African normative context, may lead to a community failing to reintegrate the offender into their community if they perceive they had no participatory role in the offender's sentencing and therefore no co-ownership of it.[82]

To achieve this mutual translation, we need to broaden the interpretation of procedural rights from the present narrow individualistic definition (that refers mainly to offender's rights) to a holistic communitarian one. This is possible because I posit that individual rights and communitarian values share principles like individual autonomy and therefore complement each other. However, I acknowledge that there are some areas of conflict between the two sets of values and not every area will be resolved to everyone's satisfaction. One clear example is the communitarian 'right' to public participation that permits the victim, defendant and the community to deliberate sentence. This arguably infringes the defendant's right to be tried by an independent and impartial tribunal because the victim and community's views may not be impartial, even vengeful.[83] Even so, I am convinced that the translation theory is best suited as a tool for dealing with such conflict of values. This is because translation leaves intact judicial discretion to deal with sentences on a case-by-case basis, while encouraging judges to engage in cross cultural dialogue with the affected community. This not only achieves local procedural legitimacy and a pluralistic translation of rights, but also enriches the normative framework of the two models.

Section 6: Conclusion

International scholars argue for the universality of international criminal procedure on the grounds that it provides a better protection for the offender and the victim. Nonetheless, their writings disregard the 'African' problem and reinforce equality of defendant's rights (and increasingly victims' rights) but with little regard to communitarian 'rights'. They do not consider the possibility that local practices and values like reconciliation feasts are part of the sentencing process, benefiting not only the offender and victim, but also the community. With an inconclusive debate on the hierarchy of the procedural models especially from African scholars, we are denied the evidence needed to seek a legal solution to this problem.

[82] G. Townsend, 'Current Developments in the Jurisprudence of the International Criminal Tribunal for Rwanda' (2005) 5 (1) *International Criminal Law Review* 147-160, 155-157.
[83] A detailed discussion is in Ch. 2 S. 3 (v) *op cit*.

To ensure a fair, culturally appropriate sentencing outcome, principles of *Ubuntu*, reciprocity, participation and fairness could be linked to procedure and procedural rights and then applied in court. The task ahead is to create a dialogue that moves beyond this dualistic debate where traditional restorative justice and communitarian values are perceived as being in opposition to international procedural justice. The current study challenges the impulse of some to caricature Africanists and international moderates, as supportive of a strictly traditional restorative approach in the international model. The debate must seek to imagine whether the future of ICC sentencing may be shaped by a traditional restorative justice and a human rights engagement.

Kony's case has paved the way for a rethink of competing interests within international procedural justice vis-à-vis traditional restorative justice. What remains to be worked out is how the ICC sentencing framework may be shaped by traditional restorative justice and in particular, taking stock of international transplantations in Africa that have gone before. This stock taking starts in the next chapter, with an appraisal of the failings of the internationalised criminal courts to draw on traditional law or structures during sentencing. This appraisal will provide lessons on what the ICC could avoid should it wish to draw lessons from the traditional model.

CHAPTER FOUR: LESSONS FROM THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (ICTR) AND THE SPECIAL COURT FOR SIERRA LEONE (SCSL)

Section 1: Introduction

Previously in Chapter 3, we saw that the academic debate overlooks the important question: whether the international criminal paradigm could take into account incongruent normative differences so as to guarantee culturally appropriate sentencing outcomes. The neglect of this question is typified by D. Crane when he discounts the possibility of African customary procedures substituting for international ones. Nonetheless, Crane acknowledges that indictees before the SCSL have labelled the process: 'white man's justice'.[1] I then propose a theoretical model to show how these differences may be accommodated in practice. In it, the structural features of local institutions and local ideas of justice are drawn upon. I see this as critical to achieving procedural legitimacy of the ICC among the local communities.

In this chapter, I focus on the international sentencing practice of the ICTR and the SCSL. Both give crucial lessons for the ICC. First, because the ICTR's procedural regime is criticised for applying 'western-style' judicial procedures that pay little attention to local interests.[2] Yet local concepts of justice are important, more especially since the ICTR applies the Rwanda Organic law of the Gacaca jurisdiction- a blend of national and traditional procedure. For its part, the SCSL as a national-international hybrid court has faced challenges in the trial and sentencing of the Civilian Defence Forces (CDF) leaders who adhere to *Kamajor* traditional justice systems.[3]

As far as I am aware, this chapter is the only legal analysis of why international tribunals seem incapable of integrating non western normative frameworks to achieve procedural legitimacy. Following this introduction, I begin with an overview of the ICTR sentencing paradigm (Section 2). This is followed by an appraisal of the ICTR sentencing practice in relation to the Organic Law and the Gacaca courts (Section 3). The rest of the chapter will examine the SCSL sentencing

[1] D. Crane- a former prosecutor to the SCSL cited in Ch.1 S.6 *op cit.*
[2] M. Drumbl *op cit* at 133 discussed in Ch. 3 S. 2 *op cit.*
[3] The *Kamajors* are traditional hunters who live in the forests of Sierra Leone.

procedure (Section 4) followed by an analysis of the SCSL sentencing practice and the tension with *Kamajor* traditions (Section 5). Next is an appraisal of the ICTR's and SCSL's application of precedent and lessons for the ICC (Section 6). I also offer a brief conclusion (section 7).

Section 2: Sentencing paradigm of the ICTR

In this section, I discuss the ICTR sentencing framework. Through a précis of the ICTR legislative origins, I show how the dominance of 'western style' procedural rules and procedural rights occurred through transplantation of the procedural framework of the ICTY. The result of the 'copy and paste' effect is that in the ICTR normative framework dealing with an African conflict, there is hardly a place for a traditional participatory restorative approach, or communitarian values.[4]

(i) Sentencing procedures

The ICC draws on the ICTY and ICTR frameworks. Indeed, during the negotiation process for the ICC, there was criticism that the ILC Draft Statute drew too heavily from the ICTY and the ICTR.[5] Accordingly the ICTY and ICTR sentencing structure are central to an analysis of the ICC capacity to integrate non western normative standards.

To begin with, provisions of the ICTR Statute are adopted almost verbatim from the ICTY Statute[6] with minor changes. For example, the word 'former Yugoslavia' is replaced with 'Rwanda' in the ICTR Statute.[7] The same applies to the ICTR RPE.[8] The provisions on sentencing procedure in the ICTR statute are very brief. The only specific procedure is for sentencing on a plea of guilty in Rule 100 (Rule 100 ICTY RPE):

[4] Communitarian values comprising the duty to kin, reconciliation, restitution and the role of ritual are defined in Ch. 1 S. 4 *op cit*.
[5] S. F de Gurmendi, *op cit*, 220-224. Some of the differences and similarities between the ICC sentencing provisions and those of the ad hoc tribunals are sketched in Ch. 2 S.2 *op cit*.
[6] The Statute setting up the ICTY UN Doc. IT/32 Rev. 39 (1994) is annexed to the Security Council Resolution 827 of 1993, adopted on 25th May 1993.
[7] The ICTR Statute was set up under S.C. Resolution 955 (Nov.8 1994) reprinted in 33 I.L.M 1602 (1994).
[8] ICTR Rules of Procedure and Evidence (1994) UN.Doc.ITR/3/Rev.2.

Rule 100: Sentencing Procedure on a Guilty Plea

> (A) 'If the Trial Chamber convicts the accused on a guilty plea, the Prosecutor and the Defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence.
> (B) The sentence shall be pronounced in a judgement in public and in the presence of the convicted person subject to Rule 102 (B)'.[9]

At first blush there are similarities between the ICTR and the ICC sentencing provisions. Firstly, under Rule 86 (c) ICTR RPE, during a full hearing, 'the parties shall also address matters of sentencing in closing arguments' (Rule 86 (c) ICTY RPE). Under Rule 100 (A) the parties may submit relevant information on sentencing. This has the same effect as Articles 76(1) and (2) of the Rome Statute. Secondly, Rule 87 (A) provides that after declaring the hearing closed, the Trial Chamber 'shall deliberate in private.' The effect is the same as Article 74(4) of the Rome Statue. This feature was aptly surmised in *Prosecutor v Paul Bisengimana*: 'the determination of the sentence is left to the discretion of the Chamber'.[10] Thirdly, under Article 22 (2) ICTR Statute (Article 23 (2) ICTY Statute) and Rule 100 (B), the Trial Chamber shall pronounce judgments in public. In practice, the tribunal's decisions are also posted on the tribunal's website for public access (by the literate).[11] The text is similar to Article 76 (4) of the Rome Statute.

The main difference, however, is under Article 23 (1) expounded in Rule 101 (B) (iii) ICTR RPE. There, the Trial Chamber while imposing sentence is enjoined to consider general practice on prison sentences in Rwanda. Consideration of state practice provides a uniform standard for determining sentences and protects the principle of *nulla poena sine lege* where punishments must be laid down in law.[12] Though Article 77 of the Rome Statute draws from Article 23, it makes no reference to recourse to local or national sentencing practices.[13]

Overall, the ICTR sentencing provisions bear the hallmarks of the ICTY features namely: a sentencing process underpinned by a centrality of judicial

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[9] *Ibid*, Rule 102 (B) provides that a warrant shall be issued for the arrest of the convicted person if he is not present in court for whatever reason.
[10] *Prosecutor v Paul Bisengimana* ICTR-00-60-T*:* Judgement of 13th April 2006, para 109.
[11] ICTR decisions are available at http://www.trim.unictr.org visited on 21/11/2008.
[12] V. Morris and M. P Scharf, *The International Criminal Tribunal for Rwanda* Vol. 1 (Irvington-on-Hudson, New York: Transnational Publishers Inc., 1998) 584-585. A discussion of punishment in the ad hoc tribunals and SCSL can be found in W. A. Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press: Cambridge, 2006) Ch. 14.
[13] M. Drumbl *op cit* 134-135. Punishments under the Rome Statute are set out Article 77 discussed in Ch. 2 S. 3 (ii) *op cit.*

authority. This reflects the common premises on which the ICTR, ICTY and the ICC procedural frameworks are built: the adversarial-inquisitorial procedural model and retributive philosophical underpinnings. This may lead some to argue that such a framework renders the ICTR unable to adapt to traditional participatory features. I now turn to the third premise: individual human rights foundations.

(ii) Human rights standards

One feature of the dominant adversarial-inquisitorial model is the lack of explicit procedural safeguards during the *in camera* deliberation of sentence by judges. Henham has strenuously argued that the absence of these safeguards like the right to legal counsel arises from retributive philosophical underpinnings. This retributive philosophy may be attributed to the lack of a mandatory procedure for transparency in sentence decision-making.[14] This may be because the principle of equality of arms: the bedrock of the adversarial model on which the ICTR is partly framed, does not apply to determination of sentence because at this point, evidence and representations have been heard from both prosecution and defence. Equality of arms is part of the right to a fair hearing as stated by the Human Rights Committee in *Morael v France*.[15] Its scope has been interpreted by the ICTR Appeals Chamber in *Prosecutor v Kayishema*. There it was held that equality of arms relates to equality of rights by ensuring that the 'list of rights must be respected'.[16] Later in *Prosecutor v Aleksovski*, the ICTY Appeals Chamber clarified that fairness of proceedings and equality of arms applied to both defence and prosecution, with the latter acting 'on behalf of and in the interest of the community, including the interest of the victims of the offence charged.'[17]

[14] R. Henham (2004) *op cit* 190-191 arguing that public participation is excluded, therefore courts give no indication of how they arrive at their decision: discussed *op cit* Ch. 2 S. 3 (iv) *op cit*.

[15] *Morael v France*, Communication No. 207/1986, 28 July 1989, U.N. Doc. CCPR/8/Add/1, 416: a fair hearing under Article 14 (1) must include equality as a bare minimum, expeditious procedure and respect for the principle of adversary proceedings at a suit at law as well. Other decisions include *Robinson v Jamaica*, Communication No. 223/1987, 30 March 1989, U.N. Doc. CCPR/8/Add.1, 426 and *Wolf v Panama*, Communication No. 289/1988, 26 March 1992, U.N. Doc. CCPR/11/Add.1, 399 where violations of the right to a fair trial were affirmed.

[16] *Prosecutor v C. Kayishema and O. Ruzindana* ICTR-95-1-A Appeal Judgement of 1st June 2001. Also *Tadic v Prosecutor* (IT -94-1-A) Appeal judgment of 15th July 1999 para 48 held that 'equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case'.

[17] *Prosecutor v Aleksovski* IT-95-14/1-AR73, Appeals Chamber, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16th February 1999 para 25.

It follows that the ICTR normative framework protects equality of arms, namely the protection of individual human rights of the defendant during the trial phase only. For example, rights of the accused under Article 20 ICTR Statute include: the right to equality before the tribunal and the right to a fair and public hearing.[18] These rights are adopted almost verbatim from Article 14(1)-(3) ICCPR. The ICTR RPE also protect individual rights like the right to a public hearing (Rule 78); the right to give and confront evidence (Rule 85(A)-(C)) and the right to be protected against self incriminating evidence (Rule 90 (E)). Article 19 (1) enjoin the Trial Chamber to ensure that the trial is 'fair and expeditious' with full respect for rights of the accused.[19] In other words, what we have here is a narrowly legalistic definition of individual accused's rights that do not incorporate communitarian values, yet the ICTR is an international tribunal handling an African conflict. This exclusion may be attributed to the development of international criminal law which has been described as rather 'arbitrary, unstructured and incoherent', with a diverse body of rules.[20] The legislative developments reflect this arbitrariness. I take this up in the next sub section.

(iii) Legislative origins

The legislative developments of the ICTR show two things. Firstly, that the ICTY framework was transplanted uncritically into the ICTR framework. Secondly, that the development of the ICTR was not based on a comprehensive consideration of the place of human rights in a local context. Rather there was a need to respect human rights standards, because the ICTR was an international tribunal[21] modelled on the ICTY.

The travaux preparatoires of the ICTY crucially show that developments of Article 14 ICCPR rights were restricted to the trial process that drew from the

[18] Other rights are the right to use of a language of choice; trial without undue delay; trial of the defendant in his presence with legal assistance; right to examine witnesses; the right to free assistance of an interpreter; the right not to give self incriminating evidence; adequate preparation and communication with counsel: ICTR Statute *op cit* Article 20 (1) (2) 3) and 4 (a)-(g).

[19] The court must also give due regard for protection of victims and witnesses: Article 19(1) ICTR Statute *op cit*. S. Negri notes that the consistent practice of the two ad hoc tribunals is to focus entirely on fairness and protection of the rights of the accused as set out in the statute: 'The Principle of "Equality of Arms" and the Evolving law of International Criminal Procedure' (2005) 5 (4) *International Criminal Law Review* 513-571,543.

[20] G. Sluiter (2006) *op cit* 617.

[21] R. S Lee, 'The Rwanda Tribunal' (1996) 9 (4) *Leiden Journal of International Law* 37-61, 57.

Nuremberg and Tokyo tribunals.[22] The travaux preparatoires also show that delegates were preoccupied with human rights concerns revolving round the sentence itself. To illustrate: the report proposing the establishment of the ICTY by Rapporteurs Corell-Turk-Thune, dwelt at length on protecting the principle of *nulla poena sine lege* (under Article 15(1) ICCPR) to ensure that the punishment is legitimately provided for.[23] By comparison, there was no proposal on human rights protection during the sentencing process. However, as Zappala rightly observes, it would have been inconsistent for the Security Council not to impose human rights standards on the ad hoc tribunals.[24] After all, establishing ad hoc tribunals was tied in to state responsibilities to respect human rights.

The setting up of the ICTR Tribunal by the Security Council was a response to genocide and other war crimes by the Hutu extremists in power in Rwanda, against the Tutsi minority. Up to a million people are estimated to have been killed.[25] This followed shortly after the genocide in former Yugoslavia for which the ICTY Tribunal was set up. Article 21 of the ICTR Statute adopted the ICTY Statute wholesale, without regard to the different normative standards. Additionally, Article 14 ICTR statute, enjoined the judges to adopt the ICTY RPE *mutatis mutandis*. Eventually the rules were adopted with necessary modifications (amended five times by the time of adoption in June 1995)[26] despite the clear distinction between the mandates of the two bodies. This replication was a consequence of two factors.

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[22] W. A. Schabas, 'Sentencing by International Tribunals: A Human Rights Approach' (1999) 7 (2) *Duke Journal of Comparative and International law* 461- 517, 467-468.

[23] *Proposal for an International War Crimes Tribunal for the Former Yugoslavia* under the Commission on Security and Co-operation in Europe Moscow Human Dimension Mechanism to Bosnia-Herzegovina and Croatia (February 9 1993) reproduced in V. Morris and M. Scharf *An Insider's guide to the International Criminal Tribunal for the former Yugoslavia* (1995) *op cit* Part 8 263-264. Contributions by Italy: U.N. SCOR, art.7 UN Doc. S/25300 (1993), Russia: U.N. SCOR, art 22, U.N. Doc. S/25537 (1993) and The Netherlands: UN SCOR, art 5, U.N Doc. A/25716 (1993) followed this line of argument: reproduced *ibid* at 377, 445 and 475-476. A comprehensive account of the ICTY travaux preparatoires on sentencing is in W. Schabas *ibid* 469-474.

[24] S. Zappala, (2003) *op cit*, 5. The only comprehensive proposal on rights during the trial was by Amnesty International: Morris and Scharf *ibid* 409-434: SC/CO/PG/PO, AI Index: Eur 48/02/93, para IX. Their proposal was on the rights to compensation, restitution and rehabilitation: S. 11 and the right for victim's participation during the trial in S. 10, but this was not incorporated in the final draft.

[25] *Final Report Of The Commission Of Experts Established Pursuant To Paragraph 1 of Security Council Resolution 935(1994)* U.N. Doc. S/1994/1405(1994) para 57. D. Shraga and R. Zacklin, 'The International Criminal Tribunal for Rwanda' (1996) 7 (4) *European Journal of International Law* 501-518, examine the legislative history of the ICTR, focussing on statutory provisions that are 'Rwanda specific' including the system of penalties. P. Akhavan examines its political underpinnings: 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment' (1996) 90 (3) *American Journal of International Law* 501-510.

[26] The ICTR RPE *op cit* adopted 29 June 1995 last amended on the 14th March 2008- UN Doc. IT/32 Rev. 39. Available at http://www.trim.unictr.org/ENGLISH/rules/080314/080314.pdf last visited on

Firstly, apart from desiring unity of legal approach, efficiency of resources was suggested as part of a pragmatic political move based on the co-existence of the ICTR with the ICTY.[27] The proposal submitted by the United States and New Zealand for the ICTR Statute, was drawn entirely from the ICTY Statute and adopted with some changes.[28] It has been suggested by P. Akhavan that the Rwanda Tribunal was established because of the precedential effect of the Yugoslavia Tribunal and that otherwise it would not have been set up.[29] In this respect, the ICTR has been likened to the Nuremberg trials that resounded of 'Victor's justice'[30] particularly since its procedural framework is similar in many respects. The Security Council Resolution 955 (1994) setting up the ICTR and drafted with Rwanda's active participation, is a 'Chapter-VII-negotiated- resolution'. It drew heavily from the Secretary General's Report on Yugoslavia that was deemed to be a 'blue print'. China abstained in the voting on the Resolution because in its opinion, the Council should have engaged in further consultations with Rwanda.[31] China's proposition was not followed up. If it had been, perhaps a more integrative procedural model could have evolved. Accordingly, the ICTR procedural framework merely 'copied and pasted' that of the ICTY, resulting in a statutory framework that bore little resemblance to traditional restorative procedure and the Rwandan sense of justice.

Secondly, the greatest limitation during the adoption process was that the ICTR rules were not subjected to scrutiny or debate; unlike the ICTY rules where countries and organisations contributed to their amendment.[32] The drafting of the ICTY rules took into account circumstances of the internecine strife and its aggravating factors like ethnic and religious conflict relating to a specific context in

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21/11/2008. V. Morris and M. Scharf, (1998) *op cit* 417-418 sketch the process of adoption of the Rules.

[27] S. C. Res. 955 (1994) *op cit* at 3, para 9.

[28] V. Morris and M. Scharf (1998) *op cit* 101; D. Shraga and R. Zacklin *op cit*, 504.

[29] P. Akhvan (1996) *op cit* 501.

[30] L. Reydams, 'The ICTR Ten Years On: Back to the Nuremberg Paradigm?' (2005) 3 (4) *Journal of International Criminal Justice* 977-988, 979-981 argues that because the Security Council has not broadened its power to prosecute the Rwandese Patriotic Front that are now in government, the ICTR trials can be likened to victor's justice.

[31] U.N SCOR 49th Session, 3453rd meeting, U.N.Doc S/PV.3453 reprinted in V. Morris and M. Scharf, *The International Tribunal for Rwanda* Vol. II (Irving-on-Hudson, New York: Transnational Publishers Inc., 1995) 305. China decried the 'hurried' voting on the SC Resolution as an 'incautious act' given that Rwanda had wanted to carry out further consultations.

[32] The ICTY adopted its rules on 11th February 1994 after thorough scrutiny and debate. Submissions from mainly western countries like United Kingdom, France and United States are reprinted in V. Morris and M. Scharf (1995) *op cit* 481-637.

Yugoslavia.[33] The rules adopted the adversarial approach of the common law systems but drew from the inquisitorial civil law approach.[34] By contrast, the ICTR rules did not take into account the specific context of Rwanda because it was applied *mutatis mutandis* thereby creating a framework that was not relevant to the community's normative structure.[35] According to Morris and Scharf, the aim was to ensure consistency in the RPE of the two tribunals and also give expediency in adaptation of the rules.[36] Also, the ICTY procedural rules are regarded by May and Wierda as an international criminal code because they are based on general principles underlying the major legal systems of the world and strike a balance between the common law and civil law systems.[37] My thesis does not fault this view, but only shows the dangers of uncritical acceptance that the two systems are the only ones on offer.

In conclusion, these 'copy and paste' rules distort traditional African procedure, losing some of its interactive characteristics in the process. Arguably the ICTR's practices based on the judge's role as sole arbiters, give minimal thought to local interests. This adversarial approach as I have put forth in Chapters 2 and 3, lacks characteristics that enables parties and the community to be part of social justice by participating in decision making. Given the marked similarities between the ICTR and ICC sentencing framework, it is imperative that we understand how the ICTR applies its sentencing procedures within the African context. I examine this in the next section.

[33] Statement by the President made at a briefing to Members of Diplomatic Missions IT/29 11th February 1994: *ibid* 651. Also G. Boas, 'Creating Laws of Evidence for International Criminal Law: The ICTY and the Principle of Flexibility' (2001) 12 (1) *Criminal Law Forum* 41-90, 72-73.
[34] V. Morris and M. Scharf (1998) *op cit* 416-417.
[35] I grant that both situations involved calamities but I maintain that the context within which the calamities took place was different and warranted a different procedural approach to the trial.
[36] V. Morris and M. Scharf (1998) *op cit* 413.
[37] R. May and M. Wierda (1998-1999) *op cit* 727, 745.

Section 3: Applying Rwanda's Organic Law

The Rwanda Organic law setting up Gacaca jurisdiction[38] melds international and national law with traditional Gacaca customary law to deal with a prosecution crisis of sheer numbers.[39] Gacaca jurisdiction is therefore a hybrid procedural model.[40] I am cognisant of the shortcomings of Gacaca jurisdiction when appraised against Article 14 ICCPR. These are discussed at length elsewhere.[41] In this section, I investigate instead why the ICTR has failed to integrate Gacaca traditional justice and communitarian values in its jurisprudence. Primarily, the capacity of the ICTR normative structure to achieve procedural legitimacy at the local level, exhibits a degree of normative rigidity that excludes public participation and thus communitarian values. The outcome is a failure of the tribunal to draw upon similarity with local ideas of justice and to reconcile the divergence between the two models.

[38] There have been several enactments after the first Organic Law 8/96. These are Organic Law No. 40/2000 of 26/01/2000 on which most judgements are based. This has been amended by Organic Law No. 33/2001 of 22/6/2001. Next was a revision of the 2000 law by Organic Law No.16/2004 of 19/6/2004. This too was recently amended by Organic Law No. 10/2007 of 01/03/2007. However, the articles I comment on remain unchanged in the last update of 2007. K. Apuuli Unpublished Thesis (2006) *op cit* 166-169 gives an overview of the amendments up to 2007. For an account of trials under the early Organic Laws see W. A. Schabas, 'Genocide Trials and Gacaca Courts' (2005) 3 (4) *Journal of International Criminal Justice* 879-895, 886-890. A more recent extensive study is by M. Drumbl *op cit* 85-99.

[39] K. Apuuli *ibid* Chapter 6 citing Meirhenrich (2002) at 150, note 5.

[40] *Ibid*, 80-81.These Gacaca courts are based on the popular justice tribunals like those in Mozambique.

[41] *Ibid*, Chapter Six, 186-190. Other analysts include: D. Haile, 'Rwanda's Experiment In People's Courts (Gacaca) And The Tragedy Of Unexamined Humanitarianism: A Normative/Ethical Perspective' Discussion Paper/2008.01, University of Antwerp 20-32; A. Meyerstein (2007) *op cit* 492-497,500-502; L. D Tully, 'Human Rights Compliance and the Gacaca jurisdictions in Rwanda' (2003) 26 *British Columbia International and Comparative Law Review* 385-414, 401-413; J. Fierens, 'Gacaca Courts: Between Fantasy and Reality' (2005) 3 (4) *JICJ* 896-916, 910-912; and J. Sarkin, 'The tension between justice and reconciliation in Rwanda; Politics, Human Rights, Due Process and the role of the Gacaca courts in dealing with the genocide' (2001) 45 (2) *Journal of African Law* 143-172, 164-166. I. T Gaparayi concludes that Rwanda must act in consonance with international human rights, contending that the law on Gacaca jurisdictions should be amended to ensure conformity with standards for fair trial: 'Justice and Social Reconstruction in the aftermath of genocide in Rwanda: An evaluation of the possible role of the *Gacaca* tribunals' (2001) 1 *African Human Rights Law Journal* 78-106, 88-99,101. The authors all discuss the lack of impartiality and independence of the Gacaca courts; lack of provisions on legal representation; and the lack of procedural equality of arms in a modern sense, among other shortcomings.

(i) Integrating Gacaca traditional justice

In the early jurisprudence of the ICTR, the position of the Trial Chamber in *Prosecutor v Rutaganda* was that Organic Law is for guidance.[42] Later in *Musema*, the Appeals Chamber stated that the Organic Law is for guidance on the practice of sentencing.[43] Yet no further reference was made to the Organic Law in the ICTR judgments. Neither was there any reference to the traditional Gacaca processes on which the Organic Law is based. This pattern is replicated in other sentencing decisions.[44] To understand the ICTR's inability to apply the Organic Law as guidance, I will set out the Gacaca participatory process from which the Organic Law draws in part.

Evergreen grass called *Urucaca* grows in front of the homesteads belonging to clusters of clan and family.[45] Members of the community sit on this *Urucaca* or 'lawn' to consider the cases. Gacaca is the name of this court.[46] In contrast with other African laws, Rwandese customary law distinguishes civil from criminal matters. Initially, Gacaca was only used in a local setting to handle mainly civil wrongs but would sometimes try and punish criminal offences like murder and theft.[47] This non-permanent judicial institution led by wise old men, sought to restore social order. Even though the outcome of the decision threatened the unity of the group, the court

[42] *Prosecutor v Georges Rutaganda* ICTR-96-3-T Judgement of 6 /12/99 paras. 453-454 and *Prosecutor v Jean Kambanda* ICTR-97-23, Judgment and Sentence of 4/09/1988 paras 27,37.

[43] *Alfred Musema v Prosecutor* ICTR-96-13-A Judgement of 27/1/2000 para 984.

[44] This reasoning had been followed in *Serushago* ICTR-98-39-S Judgement of 5/2/1999 para 17, *Ruggiu* ICTR-97-32-I Judgement of 1/6/2000 para 28,31; trial chambers are only obliged to take account to sentencing provisions under the Organic Law, *Ntakirutimana* Judgement of 21/2/2003 ICTR-96-10& ICTR-96-17-T para 885, *Semanza* ICTR-97-20-T Judgement of 15/5/2003 para 560-561, *S. Imanishimwe* Case No. ICTR-99-46-T: Judgement of 25th February 2004 para. 810-811 on Organic Law No 8/96, *Rutaganira* ICT-95-IC-T Judgement of 14/3/2005 para. 165-166, *Muhimana* ICTR-95-1B-T Judgement of 28/4/2005 para 592, *Bisengimana* ICTR-00-60-T*:* Judgement of 13th April 2006, para 194, *Nzabirinda* ICT-2001-77-T Judgement of 23-2-2007 para 104 referring to the 2004 law for comparison. Others like *Kayishema and Ruzindana* ICTR-95-I-T Judgment of 2/5/1999 do not explicitly refer to the Organic Law, para 5-7.

[45] J. Sarkin *op cit* 159 and E. Kamuhangire, 'African Traditional Methods in Rwanda: A Case Study of the Agacaca Method of Conflict Resolution amongst the Banyarwanda' *African Traditional Methods in Conflict Resolution, Reconciliation and Forgiveness, A Resource Handbook,* (Kampala: Centre for Conflict Resolution, 2000) 7-8.

[46] I. Gaparayi *op cit* 81 notes that defining Gacaca is difficult because of its informal and non permanent nature.

[47] *Ibid,* 81-82: n. 11, 12-13. Other matters included land rights, marriage, and business transactions of a civil or commercial nature.

had to strive to achieve consensus.[48] Gacaca operations are aptly described by C. Ntampaka as interconnected to the family unit; deferred to the head of the family; had no written rules of procedure; gave priority to community interests over individual rights and drew upon the supernatural and religious.[49]

Gacaca is premised on collective decision making, restorative philosophical underpinnings and a protection of communitarian values. Other features akin to *Ubuntu*, discussed in Chapter 2, are that the community are judge and jury of both fact and law, although the elders guide the process of public admissibility and weighing of evidence. It is worth noting that Gacaca procedure has no provision for written evidence. The emphasis is on oral evidence. Ultimately, Gacaca is often presented as the best procedural approach to restorative justice based on local culture.[50]

The Chamber's rigid interpretation of the 'general practice of Rwanda courts' in Article 23 (1) and Rule 101 (B) (iii) conversely, neglects legal opportunities for the ICTR to harness the similarities with Gacaca normative structure (including Gacaca under the Organic Law), and inquire into possible reconciliation of divergent features. The latter include limitation on parties' representations, judicial control over deliberation of sentence, the role of ritual and oral narrative. The similarity is in the public pronunciation of sentence. The consequences of this neglect in normative terms will become clearer after I examine how the ICTR applies Organic Law in its decisions. I focus on the jurisprudence up to 2007 to illustrate my arguments.

(ii) Limitation on parties' representations and the 'right' to be heard

Within traditional Gacaca courts, each member of the community has an obligation to confront or adduce evidence when necessary, as contrasted with ICTR procedure. Take the example of sentencing agreements, a feature originating from the common law model, where judges consider negotiations on an agreed sentence made

[48] *Ibid*, 81-82. Kamuhangire's view is that the matter is resolved amicably to the satisfaction of the parties involved. I find Gaparyi's explanation more acceptable as it does not present a romanticised view of customary law as free from tensions in reaching consensus.
[49] C. Ntampaka (2002) cited in J. Fierens *op cit* 913 and note 58.
[50] J. N Maogoto, 'The International Criminal Tribunal for Rwanda: A Paper Umbrella in the Rain? Initial Pitfalls and Brighter Prospects' (2004) 73 *Nordic Journal of International Law* 187-221, discussing arguments for traditional Gacaca in allowing individuals to participate in the creation of justice: 218-219.

outside court *inter partes*.[51] Sentence agreements are not binding on the Trial Chamber under Rule 62 *bis* (B). They are a form of plea bargaining where procedural rights are waived by the defendant, like the right to call defence witnesses.[52] The effect of the waiver of rights is aptly depicted in *Bisengimana's* case. Following a plea of guilty, the Trial Chamber considered Bisengimana's assistance to victims as a mitigating factor. The court heard the testimony of one witness, Claudine Uwera Bisengimana, his daughter. She testified as to how her father gave refuge to Tutsi refugees and tried to save them.[53] The Chamber also heard evidence that the defendant fled and left these people behind and some were killed. In considering the totality of this testimony, the Chamber rejected the defence's assertion that these facts constituted a mitigating factor[54] under Rule 101 (B). Their reasoning was that no other witness gave evidence on the defendant's assistance to the Tutsi refugees, and neither did the accused. The Chamber also noted that the Prosecution did not challenge this assertion.[55]

In fact, *Bisengimana's* judgement cited five instances where submissions of mitigating or aggravating factors went unchallenged by either side.[56] Despite these gaps, the Chamber made its own findings, suggesting that they were unable to apply traditional Gacaca procedures to fill in the gaps, for instance by inviting the community to give information. Moreover, Organic Law also restricts the parties who may give information during sentencing. Following a plea of guilty (Article 64(11))

[51] A sentence agreement forms part of plea bargaining - a generic term for negotiations in the criminal justice process: M. Freely, 'Perspectives on Plea Bargaining' (1979) 13 *Law and Society Review* 199-209,199-200. Plea bargaining is an example of procedural innovations by judges to fill the gap in Article 62 ICTR Statute, on the guilty plea procedure. This lacuna was filled in *Bisengimana op cit*, para 18. Some sentence agreements include: *Kambanda op cit*, *Serushago op cit*, *Ruggiu op cit*, *Prosecutor v J. Serugendo* ICTR-2005-84-I Judgment and Sentence of 12/06/06, and *Nzabirinda op cit*.

[52] *Bisengimana op cit* at para 20 applied the definition in *Prosecutor v Todorovic* Case No IT-95-99/1-S, Sentencing Judgement 31 July 2001 para 4, 10, of procedural rights that are waived in plea bargaining: the right not to plead guilty, the right to be presumed innocent, the right to a trial before the International Tribunal, the right to compel and subpoena witnesses to appear on the accused's behalf, the right to testify or to remain silent at trial, the right to cross examine prosecution witnesses, the right to testify in one's own defence and the right to appeal a finding of guilt or appeal any pre-trial rulings.

[53] *Ibid*, para.154, 157.

[54] *Ibid*, para 159.

[55] *Ibid*, para. 158.

[56] *Ibid* paras. 161-177. The factors included influence of the offender, personal and family situation, lack of previous convictions, health and lack of personal participation in the offence. Also in *Muhimana op cit*, the defence counsel did not address issues of mitigating circumstances in accordance with Rule 86(C) stating in closing arguments that he was relying on the Chamber's 'high sense of justice': para 602. Likewise in *Prosecutor v Jean de Dieu Kamuhanda* ICTR-99-54A-T Judgment of 22nd January 2004, the defence counsel did not address the court on matters relating to sentencing under Rule 86 (c): para 756.

and a full hearing after a plea of not guilty (Article 65(5) (h)): 'The Seat asks the plaintiff and the defendant if they have additional information.'[57] The effect of these provisions is to limit *who* may make representations on sentencing, just like Rule 100 (A) ICTR RPE. Clearly then, both the ICTR and Organic Law procedures subvert individual and communitarian rights by denying the individual and community an opportunity to be heard on sentencing. Notably, the ICTR did not reconcile this divergence. The upshot is that the ICTR may have come to a sentencing decision that was inappropriate because of the lack of sufficient information.

(iii) Deliberation of sentence and the 'right' to a public hearing

A second divergent feature is the communitarian 'right' to participate in the deliberation of sentence, synonymous with a right to a public hearing. Under Article 21 Organic Law, 2004: 'the decisions and deliberations of judges are made in secret'. The decisions are arrived at by consensus of the Seat of the Gacaca (comprising 9 persons of integrity and 5 deputies) and if that fails, then by a majority vote (Article 24). Even so, these provisions are a distortion of the traditional Gacaca process. For although the Organic Law creates a hybrid of national law and international law[58] 'melded' with Rwandese customary procedure, the deliberation of sentence is devised without regard to the African situation. Article 21 Organic Law has the same wording as Article 23 (2) ICTR Statute. Therefore, even if the ICTR were to apply Article 21, its deliberations would still be in private. This would circumscribe the unlimited *locus standi* of the parties and community to deliberate sentence and inevitably upset the balance of a notion of traditional 'equality of arms'. Such sentencing decisions arrived at unilaterally by the ICTR, may entrench feelings of alienation and inappropriateness of decisions.

(iv) Restitution, compensation and the role of ritual

A third divergent feature is the role of ritual in restitution and compensation (reparations). It has been correctly argued that the lack of confidence in the role of the ICTR by the affected populations is attributable to the lack of compensation to

[57] Organic Law No. 16 of 2004.
[58] Under the Preamble to the Organic Law *ibid*, the Penal Code of Rwanda and the Geneva Conventions form the substantive penal law.

families (as is done in customary trials).[59] Less has been said about the failure of international procedural justice to use traditionally preferred forms of reparation in accordance with accepted rituals. In traditional Gacaca courts, reparation involves payment of a fine as compensation to the wronged party, but of equal importance is reconciliation in the form of a ritual or feast.[60]

Under Article 75 of the 2004 Organic Law, persons convicted of offences relating to property are sentenced to 'civil reparation.'[61] Crucially, both Article 23 (3) ICTR Statute and Article 75 Organic Law do not provide for a reconciliation feast. Consequently, both laws exclude traditionally accepted rituals that are as important as the reparation. A related problem is that of the procedure for obtaining the reparation. Traditionally, the community takes responsibility for its member's wrong doing and for paying the reparation. Yet as Kamatali observes, the victim is left in a weaker position due to lack of resources to file a suit in court to claim the reparation; quite unlike the traditional system.[62]

Notably, the ICTR Statute lacks a victim's right to claim for reparation, yet Rwandans' definition of justice for the genocide is that victims have a right to compensation.[63] Moreover, the ICTR exemplified in *Ndindabahizi*, tend to focus on imprisonment as if it is the only penalty that can be imposed by the Tribunal.[64] According to Shelton, reparation was not considered by the ICTR because it was assumed that the defendants were indigent.[65] Apuuli has since established that the Organic law provisions are not effective because the majority of the defendants *are* indigent.[66]

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[59] R. Zacklin, 'The Failings of Ad Hoc International Tribunals' (2004) 2 (2) *Journal of International Criminal Justice* 541-545 n. 86.

[60] E. Kamuhangire *op cit* 7-8. The culprit is fined or reprimanded and has to buy a pot of local brew for the communal reconciliatory feast. This is similar to the Acoli *Mato Oput* ceremony described in Ch. 1 S. 1*op cit*.

[61] Organic Law 2004 *op cit* Chapter VII: Articles 94, 95 and 96. The court determines the methods, period of payment, and forms of compensation under national law.

[62] J. M Kamatali, 'The Challenge Of Linking International Criminal Justice And National Reconciliation: The Case Of The ICTR' (2003) 16 (1) *Leiden International Journal* 115-133, 130-132.

[63] F. Nsanzuwera, 'The ICTR Contribution to National Reconciliation' (2005) 3 (4) *Journal of International Criminal Justice* 944-949, 946 and K. Apuuli *op cit* 138.

[64] *Prosecutor* v *Ndindabahizi* ICTR-2001-71-I Judgement of 15/7/2004 para 496. *Kambanda op cit* para 41, *Ruggiu op cit* para 26, *Musema op cit*, para 978, *Ntakirutimana op cit* para 880 are other examples.

[65] D. Shelton, *Remedies in International Human Rights Law* 2nd Edition (Oxford, New York: Oxford University Press, 2005) 230-238.

[66] K. Apuuli *op cit* 191- 192, quoting excerpts from his interviews with organisations for victims.

Although I agree with these views, the authors draw no linkage between international procedural rules and the community sense of disparate justice. The rules lack a mechanism by which the community can develop a shared perspective that offenders have been tried, denounced and held accountable in a fair process. In other words, ownership of the process is lacking because success in sanctioning at the local level, is measured by the degree of reparation for the victims and their participation.[67] Since international rules are grounded in a retributive philosophy, they seem not to accommodate restorative justice.

(v) Reconciliation, Rehabilitation and ritual

Let us examine how the international aims of reconciliation and rehabilitation are realised while taking into consideration restorative values and the role of ritual. The Security Council's resolution setting up the ICTR emphasised that the aim of the ICTR prosecutions was to contribute to 'national reconciliation and restoration and maintenance of peace'.[68] Notably, no provisions exist to guide the court on how to apply African communitarian values, for as Maogoto argues, the ICTR penal process was focused on deterrence and retribution without much effort to incorporate rehabilitation and restoration into its overall strategy.[69] For instance, there is no mention of rituals or obligatory reconciliatory feasts as *part* of the sentencing process. Likewise, there is no reference to the communitarian values that should underpin this process.

The Organic Law provides under Article 54 (3), that the defendant must apologise for the offences they have committed. Despite this sparse provision, Gaparayi's definition of reconciliation as demanding a positive action from the perpetrators is instructive.[70] In this regard, Kamatali argues, rightly in my view, that where the defendant expresses remorse to the victim face to face, this forms part of the reconciliatory restorative process. If however, remorse is expressed during the sentencing hearing several miles away from the local population, this thwarts

[67] J. Maogoto *op cit* 203.
[68] Preamble, S. C. Res. 955/94, *op cit.*
[69] J. Maogoto *op cit* 197; also Kamatali *op cit* 116.
[70] I. Gaparayi *op cit* 101.

restorative justice process.[71] Some have correctly observed that the strong sense of injustice and inequity among individual victims is replicated by experiences of victim communities with regards to the inability of the tribunals to promote reconciliation.[72] The ICTR has also in the past been blamed for failing to promote reconciliation due to the fact that it is preoccupied with applying an individual level of justice to promote social order, and thereby fails to appreciate that:

> 'There must be collective catharsis for reconciliation to be realised. (…) the structural distance of the tribunal from the Rwandan social process [has] made it difficult for its work to be relevant and it is even more unlikely that it will address the root causes of the genocide.'[73]

The sentencing decisions of the ICTR are evidence of this thinking. In *Jean Kambanda* for example, the Chambers analysed the penalties under the 1996 Organic law and concluded that the ICTR sentences must be directed at retribution and deterrence.

Even so, there are other types of judicial responses to traditional values of reconciliation that can be discerned from the ICTR jurisprudence. For example, in *Prosecutor v Eliézer Niyitegeka*, the Trial Chambers considered the protection of society as fundamental to sentencing.[74] In *Kamuhanda*, the Chamber also considered reconciliation as an objective of sentencing, but did not take it into account during sentencing.[75]

Significantly, in his dissenting opinion, Judge Maqtu in *Kamuhanda*, explained that the ICTR's purpose 'in a traditional judicial fashion' is to robustly punish the offenders with the object 'hopefully' of helping reconciliation.[76] He distinguished this from the aim of traditional Gacaca courts where neighbours and peer groups participate in the judicial process and by them the accused is heard. Only after the latter has shown penance can moral restitution be worked out. Maqtu quite

[71] J. Kamatali *op cit* 130-131 citing the verbatim report at 3453 in the case of *Omar Sherushago* who expressed remorse at length at the ICTR sitting in Arusha, Tanzania: *op cit* note 5, 7.
[72] R. Zacklin *op cit* 544 paras, D and E. N. J Kritz, 'Coming To Terms with Atrocities: A Review Of Accountability Mechanisms for Mass Violations of Human Rights' (1996) 59 (4) *Law and Contemporary Problems* 127-152, 131-132*;* H. H. C Rohne, 'International Jurisdiction and Reconciliation-Experiences from the ICTR', Max Planck Institute (April 2003) at 2-3, calls for research on the requirements of reconciliation among the Rwandan population warning that locals feel that little is done to reconcile the parties.
[73] J. Maogoto *op cit*, 215-216.
[74] *J. Kambanda op cit* Judgement of 04/09/1998, paras 18-19 (the first sentencing decision of the ICTR), 27-28. *Prosecutor v Eliézer Niyitegeka* ICTR-96-IT14-T Judgement of 16 May 2003 para 484.
[75] *Prosecutor v J. Kamuhanda* ICTR-99-54A-T Judgement of 22nd January 2004 *op cit*, para 754.
[76] *Ibid*, Judge W. C. M. Maqtu Dissenting Opinion on Sentence, para.4.

rightly observed that this normative framework belongs to the indigenous Rwandan culture; and concludes: 'The International Tribunal has no system or guidelines of the nature that Gacaca courts have, to actually put into effect the reconciliation element.'[77] Maqtu's views, though not echoed in any other ICTR judgment, are a clear testament to the impotence of the ICTR procedural framework in promoting reconciliation.

More recently in *Bisengimana,* the Trial Chamber construed its role in contributing to national reconciliation differently, observing that 'in the event of a conviction, a just sentence contributes towards these goals.'[78] The Chamber rejected a proposed agreed sentence of 14 years imprisonment and enhanced it to 15 years imprisonment with credit for time on detention.[79] While I accept that the process for arriving at the sentence may be fair by international standards, the Chamber did not elaborate the rationale for this relationship between the enhanced imprisonment term and reconciliation. In other words, there is no explanation of how imprisonment in *itself* promotes reconciliation. The Chamber did not consider the difficulties of promoting reconciliation in the context of traditional Gacaca procedures, nor relate it to Judge Maqtu's observations.

The Organic Law and ICTR Statute lack express provisions on rehabilitation. Moreover, as we saw in Chapter 2, international tribunals are reluctant to pursue rehabilitation for fear of infringing the principle of proportionality and weakening other sentencing purposes.[80] Even if rehabilitation was pursued as a legitimate purpose in sentencing, it is unlikely the ICTR would take cognisance of local rituals or ceremonies of reintegration.

The foregoing discussion shows that maintaining societal equilibrium through reconciliation and rehabilitation, are not intrinsic values upheld by the ICTR, because its sentencing procedures do not incorporate restorative aspects of African customary law and ritual.

[77] *Ibid.*
[78] *Bisengimana, op cit,* Judgment of 13th April 2006 at para 106.
[79] *Ibid,* para 203-204.
[80] Ch. 2 S. 3 (iv) *op cit* citing *Kordic op cit* at para 1073.

(vi) The oral narrative

The case of *Prosecutor v Akayesu* portrays how the ICTR dealt with the divergence between traditional oral narrative and international procedure.[81] Dr. Mathias Ruzindana, the prosecution's Socio-Linguist Expert, pointed out that in African criminal procedure; oral tradition is where facts are reported as perceived by the witness, sometimes through secondary listeners. People are not direct when answering questions particularly on a sensitive matter, so answers have to be decoded and rely on the context. In particular, decoding must take account of the characteristics of the particular speech community, the identity of and relation between the orator and the listener as well as the subject matter of the question.[82]

The Trial Chambers grappled with the problem of accommodating these linguistic and cultural factors in weighing evidence. Friman cautions that such factors may lead to misunderstanding and misinterpretation or even affect the court's ability to correctly assess the probative value of evidence.[83] To their credit, although the Chamber described witnesses' testimony as 'circuitous', they did not draw any adverse conclusions regarding the credibility of witnesses based on these peculiarities.[84] Arguably, this shows the strength of the ICTR in overcoming a 'cultural' divide. Nevertheless, this strength may be diminished somewhat through use of a foreign working language. In Article 31 ICTR Statute, the working language is English or French. The imposition of foreign languages as Nice aptly puts it, expresses a form of 'cultural imperialism'.[85] Notably, a large number of witnesses before the ICTR testified in Kinyarwanda creating a major setback where there were Kinyarwanda words that could not be translated into English and French, and vice versa.[86] Since the Rwandese culture is one of an oral 'legal' tradition; arguably the inability to communicate in a local working language makes the international process less legitimate. This is more so because parties and their communities may not understand the proceedings and *why* a particular sentence was given.[87]

[81] *Prosecutor v Jean Paul Akayesu* ICTR-96-4-A Judgement of 1st June 2001 paras. 145-146 note 13.
[82] *Ibid*, para 156.
[83] H. Friman, (2004) *op cit* 343.
[84] *J. P. Akayesu op cit*, paras 155-156.
[85] G. Nice *op cit* 386-387.
[86] E. Mose, 'Main Achievements of the ICTR' (2005) 3 (4) *Journal of International Criminal Justice* 920-943, 930-931.
[87] I acknowledge that this problem is not unique to the ICTR because this procedure is the same in other international criminal tribunals like those in Kosovo, Lebanon or Cambodia (see Ch.1 S.2 *op cit*);

(vii) Similarities: public pronouncement of sentence

Under Article 70 of the 2004 Organic Law: 'The judgement or decision taken are (sic) pronounced publicly in the meeting or next hearing (…)'. This public pronouncement of judgment is the same as that in traditional Gacaca courts and Article 22 (2) of the ICTR Statute. The Chamber has not however drawn on this similarity to make its sentencing practice more legitimate to the Rwandan population. The Chamber could for instance, give reasons in its judgement (as Judge Maqtu did in *Kamuhanda*) on whether aspects of traditional justice may be legitimately accommodated in international sentencing practice or not. The Chamber could also use expressivism to educate the community on these issues.[88] In sum, the ICTR missed an opportunity to link both the international and traditional models using a common feature.

To conclude, the present approach of the judges towards application of the Organic Law is unlikely to change because arguably the differences seem irreconcilable. I have argued that the differences are such that traditional procedures are 'appropriated' by the Organic Law. This influences judicial practice particularly since the ad hoc tribunals have been described as a 'laboratory' for the ICC.[89] The outcome is a legalistic application of principles and a failure to adopt a community centred approach. On the plus side, this prevents weakening of legal certainty through variable interpretation of law. On the negative side, African customary law is excluded, with all that that implies for the court's legitimacy in the eyes of the community it is arguably supposed to be serving. This is despite having a common feature namely the public pronouncement of sentence and similar aims like reconciliation and reparation. I now evaluate the sentencing practices of the SCSL in the next section.

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and human rights bodies like the European Court for Human Rights. Even so, I maintain that language barriers alienate illiterate and semi- literate communities that the courts are meant to serve.

[88] M. Drumbl *op cit* at 131-132,175 singles out the ICTR's weakness as addressing only the international community and 'memorialising' the violence: a valid criticism of expressivism.

[89] S. Bourgon, 'Procedural Problems hindering Expeditious and Fair Justice' (2004) 2 (2) *Journal of International Criminal Justice* 526-532, 527.

Section 4: Sentencing framework of the SCSL

This section investigates the sentencing practices of the SCSL. I demonstrate that the sentencing regime is inadequate to reconcile competing procedural interests as exemplified in the CDF trial, because its framework is similar that of its predecessor- the ICTR. Nonetheless, the SCSL regime has some unique provisions that could be used to harness African customary procedures and values into the international paradigm.

(i) The sentencing procedural regime

The SCSL procedural regime is an excellent example of an international-national hybrid court[90] that draws heavily from the ICTR: Article 14(1) SCSL Statute applies the ICTR RPE '*mutatis mutandis'* to its proceedings.[91] The SCSL also has the option of applying Sierra Leonean law where appropriate (Article 14(2)). The principle of legality in Article 19(1) provides that the Trial Chamber shall have recourse to practice on prison sentences of the ICTR and the courts of Sierra Leone. The detailed procedure on sentencing is set out below:

Rule 100 SCSL:

> (A) 'If the Trial Chamber convicts the accused or the accused enters a guilty plea, the prosecutor shall submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence no more than 14 days after such conviction or guilty plea. The defendant shall thereafter, but no more than 21 days after the Prosecutor's filing submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence.
> (B) Where the accused has entered a guilty plea, the Trial Chamber shall hear submissions of the parties at a sentencing hearing. Where the accused has been convicted by a Trial Chamber, the Trial Chamber may hear submissions of the parties at a sentencing hearing.
> (C) The sentence may be pronounced in a judgement in public and in the presence of the convicted person, subject to Rule 102 (B).'

Rule 100 above has similar features to the ICTR RPE. Both sides may submit relevant information to assist the Trial Chamber determine an appropriate sentence

[90] M. Frulli, 'The Special Court for Sierra Leone: Some Preliminary Comments' (2000) 11 *EJIL* (4) *European Journal of International Law* 857-869, 859- 862 describing the dual nature and of the SCSL as a national and international court.

[91] Article 14(1) Statute of SCSL provides that the RPE of the ICTR in force at the establishment of the SCSL shall be applicable *mutatis mutandis* to the conduct of legal proceedings before the Court. The Statute for the Special Court for Sierra Leone is annexed to the Agreement of 16th January 2002 between the United Nations and the Government of Sierra Leone on the Establishment of a Special court for Sierra Leone pursuant to S.C Res. 1315 of 2000

and judgment may be pronounced in public and in the presence of the accused. In practice, the SCSL delivers its judgements in public and also posts them on their website.[92] Most importantly, under Rule 87 (A), all deliberations of the Trial Chamber shall be in private.

A notable distinction is the margin of 'appreciation' in Article 14 (2), where judges may adopt rules to provide for a 'specific situation' not covered by the existing ones. In so doing the judges are guided by the Criminal Procedure Act 1965 of Sierra Leone. There are no amendments to the provisions on sentencing. Still, the potential for accommodating traditional justice exists because judges have in the past used their powers to amend Rule 100. They have for example, specified time frames within which information for sentencing should be submitted.[93] However, the Criminal Procedure Act may not provide sufficient guidance on traditional justice, because its origins are of the common law tradition.[94] A look at the drafting history shows that the amendments following Article 14 (2) were made during the judges' plenary sessions, but most were motivated by procedural expediency. The court also seems to have minimised civil law oriented amendments because most judges are from a common law background, therefore the rules essentially resemble common law.[95] Since the court has international oversight, arguably, any amendments to Rule 100 would still leave unaddressed, the question of the assimilation of traditional restorative process and communitarian values.

The SCSL procedural rights framework has been lauded for having a 'high standard of procedural protection, in line with international human rights instruments.'[96] Despite this, it does not provide explicitly for rights during the sentencing process. What exists is Article 17 providing rights for the accused during the trial. Both the Trial and Appeal Chambers are enjoined under Rule 26*bis*, to ensure that the trial is fair and expeditious with full respect for rights of accused and

[92] *Prosecutor v Alex Tamba Brima; Brima Bazzy Kamara and Santigie Borbor Kanu* SCSL-2004-16-T at http://www.sc-sl.org/AFRC.html; *Prosecutor v Moinina Fofana and Allieu Kondewa* SCSL-04-14-T at http://www.sc-sl.org/CDF.html and *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao,* SCSL-2004-15-T at http://www.sc-sl.org/RUF.html.
[93] SCSL RPE amended on 29 May 2004.
[94] *The Law People See: The Status of Dispute Resolution in the Provinces of Sierra Leone in 2002*, 8-9 on the English common law origins of Sierra Leone law: National Forum for Human Rights publication available at http://www.sierra-leone.org/lawpeoplesee.pdf. Visited on 9/07/2008.
[95] T. Perriello and M. Wierda, *The Special Court for Sierra Leone under Scrutiny*, (Prosecution Case Studies, International Centre for Transitional Justice, March 2006) 16-17. Available at the website: http://www.ictj.org/static/Prosecutions/Sierra.study.pdf, visited on 27/02/2009.
[96] H. Friman (2004) *op cit* 327.

due regard for protection of witnesses.[97] This emphasis on individual rights, with no mention of communitarian values can be traced to the SCSL legislative origins.

(ii) Legislative Origins

Let me give a brief background of the facts that led to creation of the SCSL. The civil war in Sierra Leone was begun in 1991 by the Revolutionary United Front (RUF) – a political movement against corruption and monopoly of power.[98] RUF overthrew the government but later their activities degenerated into a culture of violence as they tried to control the country's diamond and mineral wealth.[99] There was an invasion of Freetown (the capital city of Sierra Leone), by the Armed Forces Revolutionary Council (AFRC) who in January 1997 took over power. AFRC even formed a junta government with the RUF but this did not last. Another warring faction was the CDF (largest, most powerful pro-government militia force)[100] that was made up of citizen's militia. The militia was based on traditional hunting societies called the *Kamajors* under the leadership of Chief Sam Hinga Norman.[101] *Kamajor* traditions comprised two stages. The 'immunisation' process involved smearing initiates with mystical herbs rendering people immune to bullet wounds.[102] The 'initiation' ceremonies gave hunters powers to turn into an animal to catch their prey.[103] There were even rules prohibiting crimes like killing of civilians, women or the surrendered enemy.[104] However, the *Kamajor* hunting tradition was usurped and turned into criminal acts of mutilation and cannibalism by the CDF, including its *Kamajor* initiates.[105] This turn of events arose because the initiation process was truncated and proscriptions were not taught to the fighters who were hastily recruited

[97] SCSL Rules of Procedure and Evidence, adopted 29th May 2004. Rule 75 on measures for protecting victims and witnesses.
[98] T. Perriello and M. Wierda *op cit* 4-9, give insight into the sequence of events and the different factions fighting for power.
[99] Human Rights Watch /Africa, *We'll Kill if You Cry: Sexual Violence in the Sierra Leone Conflict* Report 2003 at 10 available at http:/hrw.org/reports/2003/sierraleone/sierleon0103.pdf visited on 9/07/2008.
[100] *Ibid*, page 10.
[101] Hinga Norman died in custody on the 22nd February 2007.
[102] Judge B. Itoe, Separate and Partially Dissenting Opinion Only On Count 8 in *Prosecutor v Moinina Fofana and Allieu Kondewa* (SCSL-04-14-T) Judgment of 2nd August 2007 para. 2.2.8: para 313.
[103] S. Rodella, *Justice, Peace and Reconciliation in Post Conflict Societies: The case of Sierra Leone* (2003) Unpublished Masters of Arts in Law and Diplomacy Thesis, Tufts University USA, Annex 2 note 298: the ceremonies originate from the Mende cult of traditional hunters.
[104] B. Itoe Dissenting Judgment *op cit* para 314.
[105] T. Perriello and M. Wierda *op cit* 6, 9.

due to the need to increase the numbers. Children some even as young as 11, were taken through these rituals.[106]

Following an Agreement between the UN and the government, the SCSL was established.[107] The court was part of the UN model of 'internationalised jurisdiction', the first of its kind set up by a treaty based agreement between the UN and a state.[108] In this respect, the SCSL differs from the ICTR that is set up by a Security Council Resolution. The jurisdiction of the SCSL is sometimes described as 'mixed' jurisdiction of dual subject matter, because some crimes that it can try are national in character. For instance, Article 5 provides for crimes under Sierra Leonean law, whereas other crimes are violations of international law.[109] The Statute does not refer to traditional customary laws, for as B. Dougherty puts forth, the political aim was to create a court that was right for the international community's commitment to *international* criminal justice.[110]

The preceding analysis of the SCSL sentencing framework reflects centralised judicial control, a predominantly retributive ideology, strengthened by protection of individual accused's rights. It follows that the SCSL framework is in keeping with the international justice paradigm as exemplified in the jurisprudence of the SCSL.

Section 5: Sentencing jurisprudence of the SCSL

In this section, I examine the SCSL sentencing jurisprudence. The SCSL lacks legislation along the lines of Rwanda's Organic law which complicates matters somewhat because without it traditional procedures can not be easily introduced into the international arena. As the CDF trial illustrates, this renders the SCSL sentencing process bereft of any reference point concerning traditional procedure or

[106] B. Itoe, *op cit*, paras. 315- 317.
[107] SC Res 1315 (2000) of 14th August 2000. *Report of the Secretary General on the establishment of a Special Court for Sierra Leone* U.N.Doc.S/2000/915: Annex and enclosure. For an analysis see R. Cryer, 'A "Special Court" for Sierra Leone' (2001) 50 (2) *ICLQ*, 435-446.
[108] D. Shraga, 'The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions' in Internationalised Criminal Courts, in C. P. R Romano, et al, (2004) *op cit* from 16; M. Pack 'Developments at the Special Court for Sierra Leone' (2005) 4 (1) *The Law and Practice of International Courts and Tribunals* 171-192, 171. Another example is the Extraordinary Chambers of Cambodia: details in Ch.1 S.2 (ii) *op cit*.
[109] M. Frulli, *op cit* 859. SCSL Statute *op cit*, Articles 3 and 4 that refer to the Geneva Conventions, Additional Protocol II and International Humanitarian law.
[110] B. K Dougherty, 'Right-Sizing International Criminal Justice: The Hybrid Experiment at the Special Court for Sierra Leone' (2004) 80 (2) *International Affairs* 311-328, 312, 324-328. Emphasis is mine.

communitarian values. I conclude that there is need for innovative interpretation to mitigate this divergence.

The CDF accused did not overtly ask to be tried under traditional customary laws. Rather, they used traditional customary practices to their advantage and viewed the international criminal proceedings as 'white man's justice'. For example, Rev. SamForay a supporter of the CDF has castigated D. Crane and his 'cohorts'-the SCSL, of being:

> 'engaged in a dizzying array of legal gymnastics all aimed at further humiliating Chief Sam Hinga Norman and making life for him and his colleagues …a bit more hellish.'[111]

SamForay accuses the government and the UN of using 'racist and tribal' statements by identifying the *Kamajors*, Mendes and Poro society as cannibals. He has gone on to exhort Sierra Leonean people to redeem themselves from this 'madness called the Special Court.'[112] SamForay's criticism takes us back to my first line of argument that questions the effectiveness of international procedural justice. How effective is a global system that so distances itself from the local norms, that it can be characterised as engaging in 'legal gymnastics'?

This 'distance' is clear from Cockayne's observation of judges and personnel at international courts. They find local social practices incomprehensible and then either exclude them from their narratives, or use the trial as an opportunity to denounce those very practices. This strategy reinforces tribal and other group solidarities that lies at the root of the conflict, and only serves to distance the local community from the international tribunals.[113] C. Sriram likewise comments that the 'notable failure of international tribunals has been their inability to communicate with the affected society'.[114] These comments illustrate how integrating African customary procedural standards are thwarted particularly where the court has an impoverished view of traditional procedures and communitarian values.

There is a misplaced belief that effective outreach programmes avoid the pitfalls of the ICTR whose sentencing outcomes are viewed by Rwandans as

[111] Web posting by the Rev. A. M SamForay of the CDF Defence Fund, available at www.lumleybeach.com/wwwboard/messages/191.html, visited on 19/07/2007.
[112] *Ibid*.
[113] J. Cockayne, 'Hybrid Mongrels? Internationalised War Crimes Trials as Unsuccessful Degradation Ceremonies' (2005) 4 *Journal of Human Rights* 455-473, 464-465. Using H. Garfinkel's analytical framework Cockayne highlights the challenges of hybrid tribunals to balance morality and simultaneously appeal to local and international communities.
[114] C. L Sriram, 'Wrong sizing International justice? The Hybrid Tribunal in Sierra Leone' (2005-2006) 29 (3) *Fordham International Law Journal* 472-506, 495.

inappropriate. Crane's praise of the outreach programmes is similar to Scharf and Kang[115] but they all fail to appreciate the weakness of this approach. Outreach programmes are spearheaded by the court itself to make its mission and procedures accessible to those in rural areas. The mandate is not to integrate African customary procedures into the trial but rather it is an advocacy crusade for the tribunal. Therefore the local communities have no input in the way the court functions, but are mere recipients of information. The sentencing practices of the court mirror outreach programmes. As a result, the goal of harmonisation becomes even more elusive because of the primacy of international bodies that exclude indigenous trial frameworks. This leads to a 'democratic deficit' in international law,[116] one that lacks an understanding of the traditional sentencing process.

(i) *Kamajor* traditional sentencing process

The traditional processes of justice have not been explored to their full potential by the SCSL.[117] Sierra Leone's existing chieftaincy system applies both customary and national law. Chiefs are nominated under customary law, elected by the government and their decisions are officially recognised alongside those of the courts of law.[118] However, operating outside these legally recognised court settings, are the secret societies to which many in the rural areas belong.[119] Of the 16 ethnic groups in Sierra Leone, 3 are secret societies: Poro of the Mende, Temne and Sherbro.[120] The Poro instigated the *Kamajor* movement in Kenema district. Secret societies have their own 'legal' system with its own laws, procedures, punishments and criminal jurisdiction over crimes committed 'out of the bush'.[121] The secrecy arises from the belief that giving any information to outsiders may invite curses to the individual and his immediate family. As Judge Itoe pointed out, there was little

[115] M. P Scharf and A. Kang 'Errors and Missteps: Key Lessons the Iraqi Special Tribunal can learn from the ICTY, ICTR, and SCSL' (2005) 38 *Cornell International Law Journal* 911-948, 917-918.
[116] M. Drumbl *op cit* 133-135.
[117] S. Rodella *op cit* 113.
[118] *The Law People See*, *op cit* 9, 22-24.
[119] *Ibid*, 31. Women, however, are barred from leadership positions: 32.
[120] S. Rodella *op cit* note 284. Comment by Allridge in H. Marriott, 'The Secret Societies of West Africa' (1899) 29 *Journal of the Anthropological Institute of Great Britain and Ireland* 21-27, at 27. The Mende and the Temme are the largest ethnic groups: Human Rights Watch (2003) *op cit* at 9.
[121] *The Law People See*, *op cit* at 32. For instance, sexual relations with uninitiated women are considered a crime.

evidence in the CDF trial to prove the accused persons' direct involvement because of the secrecy and mythology that characterises *Kamajor* activities.[122]

Despite the mystery surrounding their practices there are earlier accounts of secret societies processes. For example, Driberg's anthropological study of secret societies like the Poro found that they had special tribunals that applied automatic spiritual sanctions for breaking the law, reflective of punitive tribal justice.[123] Elias's appraisal of the Poro established that the secret societies administered justice in certain categories of political offences in the local communities.[124] Trials involving influential dignitaries 'notables' for offences like treason, took place behind closed doors and only the verdict was reported after evidence was heard and decisions taken.[125]

With regards to contemporary trial and sentencing procedures there is little to go by. Even so, according to the Manifesto 99 Report, some of these secret society ceremonies involve rehabilitation and purification and therefore could play a role in reconciliation.[126] For example, the purification ritual, a major form of reconciliation among the Mende, involves symbolic cleansing and spiritual intervention that expiates perpetrator's sins by 'washing' away any curse that may be incurred.[127] Libation may be offered to the ancestors whereby *baagobi* (red rice) and *njalei* (cool water) is offered in a shrine in a sacred bush, followed by a feast. For crimes like theft, offenders are made to dance publicly and subjected to treatment that may qualify as torture.[128] Such treatment underpins the punitive philosophy of the adjudicatory process. Invoking the supernatural intervention of sprits known as 'Swearing' is used where the case remains unresolved. Invocation of specific spirits among the Mende and Sherbro brings a curse on the suspected offender to cause death or bring ill luck. It gives some satisfaction to victims but also reflects the punitive aspect of their traditional law.[129]

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[122] Dissenting Opinion of Judge B. Itoe *op cit at* para 34.
[123] J. Driberg (1934) *op cit* 237-238 and note 1.
[124] T. Elias *op cit* at 216-217.
[125] *Ibid*, 227, 228, referring to F. W Butt-Thompson, *West African Secret Societies* (London: Witherby, 1929).
[126] *The Law People See op cit* at 32, citing Manifesto Report 99: '*Report for the study of Traditional Methods of Conflict Management/Resolution of Possible Complimentary Value to the Proposed Sierra Leone Truth and Reconciliation Commission*'.
[127] S. Rodella *op cit* Annex 7 at 156 citing Manifesto 99 report. B. Dougherty *op cit* 324 note 60.
[128] *Ibid*, 158. The acts are not specified.
[129] *Ibid*, 157-159. This is similar to the use of sorcery as an alternative form of justice that is very popular; *The Law People See op cit* at 33.

A study by E. Sawyer in 2005 established that secret societies were ranked as very good, much higher than the courts of law in terms of their ability to resolve conflict.[130] Rodella also established that the *Kamajors* prefer to continue with their duty of protection of their community and have not expressed much willingness to counter the SCSL indictments.[131] Sawyer's and Rodella's research strongly suggests that the *Kamajor's* reluctance to get involved is because the SCSL trial and sentencing procedure is vastly divergent from their secret societies processes. This point becomes clearer in the sub section below, where I examine how the Trial Chamber grappled with *Kamajor* practices in their sentencing jurisprudence.

(ii) The Civilian Defence Forces Trial

The trial of *Fofana and Kondewa* illustrates the complexities of taking into consideration *Kamajor* practices. The two accused were indicted on 24th June 2003 for war crimes and other serious violations of international humanitarian law.[132] The Trial Chamber on 2nd August 2007 found both defendants guilty on various counts.[133] On 9th October 2007, the Trial Chamber sentenced them to terms ranging from three to eight years imprisonment, with the sentences to run concurrently.[134] On appeal by Kondewa and the Prosecution,[135] the sentences were enhanced. Fofana was ordered to serve a total of 15 years imprisonment and Kondewa a total of 20 years imprisonment.[136] I now explore the legal issues that influenced the SCSL during the sentencing process.

[130] E. Sawyer, 'Remove or Reform? A Case for (Restructuring) Chiefdom Governance in Post Conflict Sierra Leone' (2008) 107 (428) *African Affairs* 387-403, 394-398.
[131] S. Rodella *op ci,* 117. International Crisis Group, Africa Report No. 67 *Sierra Leone: The State of Security and Governance*, September 2003 at 19.
[132] *Prosecutor v Moinina Fofana and Allieu Kondewa* SCSL -04-14-T (CDF Accused), Judgement of 2nd August 2007, paras 696-607, 699-700.
[133] *Ibid*, Disposition at pages 290-292- on counts 2 and 4 of murder and cruel treatment and under counts five and 7 of pillage and collective punishments. Kondewa was found guilty of enlisting children under the age of 15 years into an armed group (Count 8) and Fofana was acquitted of that count, with Justice B. Thompson dissenting: at pages 290-292. Both were acquitted of crimes against humanity of murder, other inhumane acts and acts of terrorism on Counts 1, 3 and 6.
[134] *Judgement on the Sentencing of Moinina Fofana and Allieu Kondewa* of 9 October 2007.
[135] *Prosecutor v Moinina Fofana and Allieu Kondewa* Case No SCSL-04-14-A, Appeal judgment of 28th May 2008: Part V Disposition pages 187-191 with Judge R. Winter dissenting in part.
[136] *Ibid* page 191 with Judge G. King and Judge J. Kamanda dissenting on sentence. The acquittals were reversed and Kondewa was found guilty on counts 1, 2, 3, 4 and 5 but not guilty on counts 6, 7 and 8. Likewise Fofana was found guilty on counts 1, 2, 3 and 4 but not guilty of counts 5, in part and not guilty on counts 6, 7, 8, Judge R. Winter dissenting in part: pages 187-191.

(a) Public participation and the 'right' to be heard

We saw in Chapter 2, that public participation is a process in traditional systems that protect group rights to be heard. Conversely, under the SCSL Statute, the Trial Chamber has sole discretion to decide *who* will be heard. For example, during the sentencing hearing, the Trial Chamber dismissed an application by the defence to call a witness -Frances Fortune- to attest to the good character of Fofana. The grounds given by the Chamber was that it was not necessary to call the witness at that stage.[137] From a legal point of view, the Chamber were within their discretion to decline to hear Fortune's evidence, although we do not know the reasons why they declined to do so. From a traditional point of view, this suggests that the Chambers were more concerned with the legalistic issue of whether the testimony was of evidential value to the sentence. What the judges failed to appreciate was that this refusal denied them an opportunity to hear what mitigating factors might be availed to the defence. Theoretically, the refusal also denied the convicted persons the right to be heard by letting relatives give evidence on their behalf. For that reason, the sentence of imprisonment was entirely within the law, although the procedure by which it was arrived at is at variance with the communitarian 'right' of every adult expressing their mind on such a public issue.

(b) Reparation, compensation and ritual

In view of the previous experiences of the ICTR, it is perhaps not surprising that the SCSL has not applied its provisions on reparation (Rule 104) and compensation (Rule 105) in its judgements. Yet as some like Sriram point out, victims before the SCSL expressed the expectation that they would receive compensation.[138] Apart from denying victims an opportunity to get reparation, the sentencing procedure excludes any possibility of applying local rituals that follow compensation. As I pointed out in Chapter 2, restitution is inseparable from ritual because of the need to appease the wrath of the gods through sacrifice even after reparation satisfies the living. Yet the philosophy inherent in international procedure means that the court puts emphasis on retribution rather than restitution. This is evident when the Trial Chamber, using

[137] *Prosecutor v Fofana and Kondewa* Sentencing Judgment of 9th October 2007 *op cit*: paras 12-13 note 19, citing the transcript of the sentencing hearing.
[138] C. Sriram *op cit* at 103.

expressivism, affirmed that the primary objective of sentencing includes retribution and deterrence, and the sentence of the tribunal should:

> '…Make plain the condemnation of the international community of the behaviour in question and show that the international community was not ready to tolerate serious violations of international humanitarian law and human rights.'[139]

The emphasis here is on the international community, with little mention of the local audience who are supposed to benefit from the sentence. Drumbl persuasively argues that fear of involving locals in international 'operations' arises from a misplaced national or ethnic bias.[140] Such bias as we can see, excludes those with the greatest interest from participating in the sentencing procedures. More so, international procedure excludes deliberation of sentence which means that judges have no opportunity to engage with the community and inquire into acceptable reparation and any rituals that may accompany them.

In spite of this, the judges are alive to these traditional practices and have even discussed them in their judgements. Nonetheless, they appear to be dismissive of traditional practices. Judge Winter, for instance, argued that the SCSL, not being a domestic court could not accept 'any cultural considerations as excuses for criminal conduct'.[141] This in my view excludes the more positive cultural considerations like processes of reparation that *do* exist. No questions were raised during the trial on what these positive traditional practices might be. This lends credence to Cockayne's earlier comments on the negative attitude of the judges and personnel towards traditional practices, and explains why the SCSL remains remote from the local experience.

(c) Reconciliation and ritual

The principle of reconciliation is found in the key Security Council Resolution which states that a credible system of justice and accountability would contribute to national reconciliation in Sierra Leone.[142] Arguably the sentencing judgment in

[139] CDF Sentencing Judgment *op cit* para 26 citing *Aleksovksi* Appeal Judgment op cit para 185, *Kambanda* Trial Judgment *op cit* para 28 and Nikolic IT-02-2-60/I-S (TC) Sentencing Judgment 2 December 2003, para 86.
[140] M. Drumbl *op cit* 136 propounding the 'democratic deficit' in international law.
[141] *Prosecutor v M. Fofana and A. Kondewa* (SCSL-04-14-A), Partially Dissenting Opinion of Judge R. Winter *op cit* para 4.
[142] Preamble, S.C. Resolution 1513 (2000) *op cit*.

Fofana and Kondewa, shows the failure to integrate reconciliation as part of the sentencing process. The sentencing hearing shows how the Trial Chamber grappled with the question of reconciliation. The Chamber's approach was based on the international model of gathering information from the defendants and the prosecutor only.[143] It did not gather any information from the community on how best to achieve reconciliation in their context. Rather, the debate was on the severity or leniency of the sentence in relation to the mitigating factor of remorse.[144] No mention was made of the role of ritual in reconciliation. Moreover, the Appeals Chamber declined to enter into a discussion of whether the appellant's subsequent post conflict behaviour showed remorse and therefore signified attempts at reconciliation.[145] Only Judge Winter in her dissenting opinion held that the statements by the two appellants did not show remorse because they were made after the conviction.[146] Be that as it may, there was no attempt to accommodate *Kamajor* reconciliation processes, thereby undermining the very objective of reconciliation expressed in the Security Council resolution.

(d) Other Trials: The AFRC and RUF sentencing procedure

It is instructive that in the earlier judgment of the AFRC accused, an attempt was made to integrate traditional elements of crime into international law. This failed because of a procedural error in a defective indictment which meant that crucial evidence was excluded. The excluded evidence could have determined whether the accused were guilty of 'forced marriage', or had married the girls under traditional marriages.[147] The Trial Chamber decided that 'forced marriage' is subsumed in the crime against humanity of sexual slavery, despite the lack of evidence (caused by the rejection of the count) and found them guilty of that instead. Justice J. Sebutinde in a separate concurring judgment argued that:

[143] Sentencing Judgment of 9th October 2007 *op cit* paras 12-13.
[144] *Ibid*, paras 63-65.
[145] *Prosecutor v Fofana and Kondewa* Judgment of 28th May 2008 *op cit* paras 536-541, 541.
[146] Partially Dissenting Opinion of Judge R. Winter of 28th May 2008, *op cit* Part E, paras 90-104, 102-103.
[147] *Prosecutor v Alex T Brima, Brima B. Kamara and Santigie B. Kanu* SCSL-04-16-T, Judgement of 20th June 2007 on Count 7. Interestingly, the Defence Expert Witness Dr. Dorte Thorsen declined to carry out research on the concept of forced marriage for fear of the consequences of drawing links between social practices between kin groups, international conceptualisations of forced marriages and the Sierra Leonean situation.

> 'To throw out the overwhelming body of evidence of 'forced marriage' as a consequence of the Prosecution's procedural error, would in my opinion be doing a great injustice to the hundreds of victims of 'forced marriage' who look to this court for redress.' [148]

In the event, the sentencing hearing followed the CDF sentencing procedure. Brima and Kanu were each given 50 year jail terms and Kamara a 45 year jail term.[149] These terms were upheld on appeal.[150] Did such stiff sentences in the AFRC case mean that the court had avoided doing a 'great injustice' to the victims? It is difficult to see how such sentences secure 'redress'. The 'great injustice' in my opinion is the lack of a communitarian participative 'right' for the victim and community to give evidence on their preferred sentence. As Rule 100 stands, this must be routed through the Prosecutor or Defence. Likewise in the RUF judgement, Sesay, Kallon and Gbao were found guilty among others, of inhumane acts-forceful marriages, and given long sentences of 52, 40 and 25 years.[151] Since the SCSL procedural regime does not recognise communitarian values, it cannot order as part of the sentence, traditional compensation or reconciliation rituals, as neither outcome is provided for in the SCSL RPE.

In summary, the preceding audit of the sentencing jurisprudence of the SCSL provides a comprehensive analysis of the normative rigidity in the structural framework. It is also an indicator that international sentencing practice has failed to consider local norms and practice, due to a narrow judicial approach. This reflects the related problems of lack of guidelines on the application of non state criminal procedures in international trials, transplanted international law, and a failure to apply precedent expansively.[152] Ultimately, the interpretation of the neo-traditional

[148]Separate Concurring Opinion of Judge J. Sebutinde appended to Judgement 20th June 2007 para 18. A critique of the issue of 'forced marriages is given by N. Guibert and T. Blumenstock, 'The First Judgment of the Special Court for Sierra Leone: A Missed Opportunity?' (2007) 6 *The Law and Practice of International Courts and Tribunals* 367-391, 376-380.

[149] *Prosecutor v Brima, Kamara and Kanu*, SCSL-2004-16-T Sentencing judgment of 19th July 2007 Part VI Disposition.

[150] *Prosecutor v Brima, Kamara and Kanu* SCSL-2004-16-A, Appeal judgment of 22 February 2008 Part X. The grounds of appeal related to the sentence itself e.g. harsh and excessive and problem of cumulative sentences but none on the procedure: *op cit* Part IX paras 307-330.

[151] *Prosecutor v I. H. Sesay, M. Kallon and A. Gbao*, SCSL-2004-15-T Judgement of 25 February 2009 paras 28-39 and Disposition, pages 17, 20. Sentencing Judgment of 8th April 2009 VI Disposition pages 93-99.

[152] Others factors like abolished African customary law, cultural imperialism and ad hoc legislative origins apply equally to Sierra Leone. Still most literature refers mainly to the official account of the state law. Some authors include: A. T Cole, 'The Special Court for Sierra Leone: Conceptual Concerns and Alternatives' (2001) 1 (1) *African Human Rights Journal* 107-126 and 'Report on the Special Court Rules of Procedure and Evidence Seminar,' Sierra Leone Bar Association, Freetown, 3/12/2002.

customary procedure into international law is not possible in a framework that regards African procedural law as separate and indivisible.

Section 6: Applying precedent: the challenges

Some have argued that increasingly international law is becoming case law, with a range of admissible precedents applied by international ad hoc tribunals to procedural law.[153] Therefore precedent is very influential in the development of international criminal jurisprudence. This section will highlight the lessons on precedent for the ICC in the context of dealing with African conflict.

Jurisprudence of the ICTY,[154] ICTR and SCSL are of limited precedential value to the ICC with regards to integration of traditional restorative justice and protection of communitarian values. Even if we argue that procedural rights ought to apply to sentencing, there remains the problem that the normative scope of procedural rights does not accord rights to the victim or community as such. Individual rights are a 'culturally specific' concept in international law, so although the rise of rights in the West seems irresistible, in African customary law it does not receive much prominence in this sense.[155] To even apply an expanded construct of rights is not so straightforward, because the doctrine of precedent is applied within narrow legal confines. Such an approach fails to take into account the differences with restorative justice practices and the implications for protection of communitarian values.

A good example is from the ICTR Appeals Chamber. In *Jean Kambanda v Prosecutor,* the Chamber applied a textual and systematic interpretation of the right to legal assistance.[156] The Chamber relied on decisions of the Human Rights Committee and the ECtHR. The Chamber applied Article 6 (3) ECHR, and arrived at the conclusion that the right to legal assistance is not absolute when the assistance is free. Further, that Article 6 (3) does not guarantee the right to choose the defence counsel

[153] Ch. 1 S. 4 *op cit* citing M. Shahabuddeen, *op cit* 15-18 depicts how international law slowly resembles the common law of England.
[154] G. Boas critically evaluates lessons for international criminal proceedings drawn from experiences of the ICTY as the forerunner in contemporary times of international criminal trials: *The Milosevic Trial: Lessons for the Conduct of complex International Criminal Proceedings* (Cambridge: Cambridge University Press, 2007).
[155] G. R Woodman, 'Customary Law in Common Law Systems' *International Development Studies Bulletin* (2001) 8 at: http://www.vanatu.usp.ac.fj/sol_adobe_documents/usp%20law/woodman.pdf visited on 20/04/2009.
[156] *Jean Kambanda v Prosecutor,* ICTR-97-23-A Judgement of 19th October 2000 para 33.

who may therefore be assigned by the court.[157] The Chamber even distinguished between authoritative and persuasive decisions of European regional and national tribunals. In justifying their conclusion, the Chamber relied on a book on the ECHR[158] and precedents from Europe.[159] Clearly, the ICTR applies the doctrine of precedent within narrow legal confines by not distinguishing the normative context within which the application is being made. Additionally, criticisms about the incapacity of international law to adopt a restorative justice approach are few.[160]

Another example is the AFRC sentencing judgment where the SCSL Trial Chamber justified its adherence to the sentencing practice of the ICTY and ICTR. Its reason was that their statutory provisions were analogous to those for the SCSL so it would be guided by them.[161] Clearly, both ICTR and SCSL view statutory provisions as a crucial factor in determining whether the judges can be interventionist or not. This is surprising given that international courts have the option of departing from their previous decisions, although they have not used this option. The ICTY Appeals Chamber in *Prosecutor v Aleksovksi,* held that a court should be free to depart from its previous decisions for cogent reasons in the interests of justice.[162] Circumstances justifying the 'departure rule' include where the previous decision was based on a wrong principle of law or given *per incuriam,* for instance where the judge(s) were ill informed about the applicable law.[163] The 'interests of justice' test is not defined in *Alekvoski*.[164] The Appeals Chamber in *Semanza v Prosecutor* followed the *Aleksovski* decision but likewise failed to define the 'interests of justice'.[165]

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[157] *Ibid*, n.48.

[158] L.E. Pettiti, E. Decaux, and P. Imbert (eds.) *La Conventiona Europe`Enne Des Droits De l'Homme, Commentaire Article Par Article* (Economica: Paris, 1999) 74-275.

[159] *X v United Kingdom* ECommHR Judgement of 9th Oct 1978, Application No.8295/78; *Croissant v Germany* ECtHR, Merits of 25th Sept 1992, Application No.13611/88 and *F v Switzerland* E.Comm H.R Decision of 9th May 1989, Application No.12152/86.

[160] Dissenting Opinion of Judge Maqtu in *Kamuhanda* ICTR-99-54A-T *op cit*, para. 4 discussed above in Section 3 (c) is one such example.

[161] *Prosecutor v Brima, Kamara and Kanu, op cit:* Sentencing Judgment of 19th July 2007 at para 33.

[162]*Prosecutor v Zlato Aleksovksi* (IT-95-14-I-A) ICTY Appeals Chamber, Judgement, 24th March 2000, para 107.

[163] *Ibid*, para 108.

[164] X. Tracol, 'The Precedent of Appeals Chambers Decisions in the International Criminal Tribunals' 17 (2004) 17 *Leiden Journal of International Law* 67-102, 70.

[165] *Laurent Semanza v Prosecutor* ICTR-97-20-A, Appeals Chamber Decision, 31 May 2000 *op cit*, para 92. Judge M. Shahabuddeen in his Separate Opinion submitted that the Chamber would have to follow its previous decision subject to a limited power of departure, but to depart depends on the interpretation of the statute. Furthermore, stability of the law should not be jeopardized by mere disagreement of a reconstituted bench who disagree with the previous decisions: para 37.

Even if they had, N. Miller's survey on precedent suggests that the ICTR is unlikely to distinguish decisions of the ICTY, and other regional bodies, because of predictability in the manner with which precedent is applied. Miller's findings show that the ICTR cited decisions of other tribunals as binding precedent and was reluctant to disagree with or distinguish them.[166] In *Baragywiza v Prosecutor*, the ICTR Appeals Chamber pointed out that:

> 'Regional human rights treaties (…) and the jurisprudence developed there under, are persuasive authority which may be of assistance in applying and interpreting the Tribunal's applicable law….They are however authoritative as evidence of international custom.'[167]

This excerpt illustrates the greatest weakness of the doctrine of precedent: it is established by written case law only[168] from 'enlightened' legal systems. In other words, the ICTR would not consider traditional Gacaca decisions as a source of precedent in the absence of some sort of guideline from other tribunals. That is why the ICTR Chambers refer throughout to Rwandan Organic law in arriving at sentence but do not cite any decisions of the traditional Gacaca courts that operate outside the legal boundaries recognised by international tribunals. Traditional Gacaca jurisprudence does not meet the criteria of consistency and predictability that are advanced through a centralised national court system because they apply largely oral African jurisprudence whose decisions are not in writing. Equally, Organic Law Gacaca courts are not courts of record. Appeals only lie from the Organic Law Gacaca jurisdiction to the Gacaca Court of Appeal which is the last court of instance, but not to the superior Court of Cassation which is a court of record.[169]

Still, judges are not using their powers to modify their procedural rules to fit the African conflict. For example, the manipulation of *Kamajor* traditions to commit crimes like cannibalism, could arguably qualify as a 'special' situation that would need special rules of procedure under Article 14(2) SCSL Statute. Yet such special

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[166] N. Miller, 'An International Jurisprudence? The Operation of "Precedent" across International Tribunals' (2002) 15 *Leiden Journal of International Law* 483-526, 490, 499. In Table 3.9 of the 11 ICTR decisions that Miller surveyed, none of the *locus classicus* were from the African Commission on Human and Peoples' Rights.

[167] *J. B Baragywiza v Prosecutor*, ICTR-97-19-AR72, Appeal Decision of 3 November 1999 para. 40. Other regional human rights treaties are the ECHR (1950); American Convention on Human Rights (1969); the Arab Charter on Human Rights (2004) and the African Charter on Human and Peoples' Rights (1981) all discussed in Ch.1 S. 2 (ii) *op cit*.

[168] X. Tracol *op cit* 68. Traditionally, under Article 38 (1) of the International Court of Justice Statute, judicial decisions are only subsidiary means of determination of rules of law.

[169] Organic Law 2004 *op cit* Article 89. See also K. Apuuli *op cit* at 190 adopting Volger's description of this court hierarchy as a 'self contained pyramid'.

rules have not been adopted by the SCSL. This could be because of the lack of transparency of the *Kamajor* secret society trial processes and bias by the judges of the SCSL. Still, there is also a lack of guidance on how this may be achieved.

The real challenge then is that the ICTR and SCSL fail to use judicial precedent creatively, yet precedents from regional bodies like the ECtHR are inappropriate for local circumstances. The deductive and inductive reasoning that follows a hierarchy of decisions from 'superior' tribunals, accentuates the problem. The ratio decidendi is developed based on analytical discussion of principles and factual application, but excludes the local socio-cultural context. Precedent also fails to give legitimacy to customary procedure because of the narrow legalistic interpretation. As a consequence, divergences between traditional and international normative frameworks are not mitigated, but stand in contradistinction to each other. It may not be unreasonable to suggest that judges will continue to rely heavily on jurisprudence from international tribunals and Western jurisdictions. The ICC will need to be creative in its use of precedent to avoid the pitfalls of the ICTR and SCSL in deciding cases relating to African conflict. By this I mean that the ICC should eschew an uncritical application of precedent.

Section 7: Conclusion

In this chapter, I established that traditional restorative processes and communitarian values have no place in the international normative sentencing framework. This is not surprising given that the procedural regimes of the ICTR, SCSL and ICC, are grounded in the adversarial-inquisitorial model and based on a primarily retributive philosophy. Such philosophy places little emphasis on localised communitarian values and participatory approaches. The ICTR sentencing practice demonstrates the legal difficulties in applying traditional Gacaca values, despite the Rwanda Organic law, and the ICTR's very own aims.

The SCSL is the first internationalised tribunal with a strengthened procedural framework to try cases involving traditional African practices. Yet its judgements exhibit an inability to accommodate features from traditional process, despite a governing provision which allows the judges to respond creatively to a 'special situation'. If anything, procedural errors have resulted in vital evidence on traditional

practices being discarded even when this evidence could have affected positively the sentencing outcome.

The sentencing practice of the ICTR and SCSL shows that although these normative differences could be mitigated through judge made rules, this has not happened in practice. I suggest some reasons why this is so. Firstly, the courts do not draw points of commonality from traditional African customary practices. Secondly, communitarian values have no place in a sentencing procedure that is inherently individualistic. Thirdly, the lack of guidelines prevents the tribunals from applying non state criminal procedures to international law. Fourthly, the tribunals seem to be inextricably bound by the precedents of the international criminal bodies like the ICTY and regional human rights bodies like the ECtHR even though theoretically there is room to consider other court decisions.

This process may be interpreted as unfair by African standards because it reflects the failure of the international paradigm to accommodate competing procedural and human rights paradigms. Analysis of the sentencing practice of the courts shows that procedural legitimacy cannot be secured in a way which Africans would see as legitimate without accommodating African norms. Therefore the ICC may need to seek guidance from the African Human rights regional mechanism on how to engage *directly* with localised concepts of procedural justice. The next question is to establish whether the regional human rights mechanism gives guidance on an African notion of procedural rights that can be reconciled with Article 14 ICCPR right to a fair trial. This is taken up in the next chapter.

CHAPTER FIVE: THE AFRICAN REGIONAL HUMAN RIGHTS FRAMEWORK

Section 1: Introduction

Previously we established that the sentencing jurisprudence of the ICTR and the SCSL is of limited precedential value to the ICC because it does not engage with competing procedural standards and divergent notions of rights like communitarian values.[1] Notably absent in the framework and jurisprudence of the ICTR and SCSL, is any reference to an African notion of procedural fairness in the regional human rights framework. The framework encompasses the African Charter on Human and Peoples' Rights (hereafter 'the Charter')[2] and decisions of the African Commission on Human and Peoples' Rights (hereafter 'the Commission').[3] Arguably, the absence of an African notion of procedural rights might be taken to imply the marginal position in international human rights law of the Charter and Commission decisions. Then again, the Charter is important because it accommodates African values and international procedural rights.

This chapter sets out to assess the extent to which the Charter (and decisions made under it) brings into harmony conflicting normative frameworks. In doing so, this chapter provides, as far as I am aware, the only legal analysis of the Charter's guidance on an African concept of procedural fairness. This analysis arises from moves to broaden the Charter obligations to cover traditional courts, through the passing of the *Dakar Declaration on Fair Trial* and the *Principles and Guidelines on the right to a Fair Trial and Legal Assistance in Africa* (hereinafter 'the Guidelines'). I argue that these instruments may not adequately resolve the tension between communitarian values and the individualistic parameters of Article 14 ICCPR because of normative rigidity within the Charter provisions and a narrow interpretation of the right to a fair trial by the African Commission. I show how the Inter American Court of Human Rights (IACtHR) may provide lessons on accommodating distinct traditional features

[1] Communitarian values defined in Ch.1 S.4 *op cit* are duty to kin, reconciliation, restitution, and role of ritual.
[2] The Charter was adopted by the 18th Heads of State and Government of the Organisation of African Unity (OAU) meeting on 27th June 1981 and came into force on the 21st October 1986: OAU Doc.CAB/LEG/67/3/Rev.5, (1981) reprinted in 21 I.L.M 58 (1982).
[3] African Commission on Human and Peoples' Rights was established under Article 30 of the Charter.

and communitarian values in judicial decisions, within the parameters of international human rights law. The appropriate solution, I conclude, lies with the clan courts themselves.

Following this introduction, I consider the tensions between Article 7 on a fair trial and communitarian values (Section 2), followed by an appraisal of the Guidelines (Section 3). Next, I investigate the application of the Charter to traditional courts (Section 4). I then appraise the jurisprudence of the Commission (Section 5) and examine lessons for the African Court of Human and Peoples' Rights from the IACtHR (Section 6). I offer a conclusion in Section 7.

Section 2: The Charter and Communitarian values

This section contains the first part of my argument that evaluates the potential of the Charter to harmonise conflicting normative frameworks. Article 7 guarantees an individual the right to a fair trial. Then again, Article 7 competes with Articles 17, 27 and 29 that recognise traditional and cultural values, impose duties on the individual and consider the rights of others. In the end, the Charter does not adequately define an African notion of procedural rights: one that engages with *both* procedural rights and communitarian values.

(i) Article 7 (1): The right to a fair trial

The Charter enjoins member states who are parties to the Charter to recognise 'rights, duties and freedoms' enshrined in it.[4] Among these is the right to a fair trial:

Article 7:

> 1. 'Every individual shall have the right to have his cause heard. This comprises:
> (a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
> (b) The right to be presumed innocent until proved guilty by a competent court or tribunal;
> (c) The right to defence, including the right to be defended by counsel of his choice;

[4] The Charter *op cit* Article 1. For a commentary on the Charter: M. L Balanda, 'African Charter on Human and Peoples' Rights' in K. Ginther and W. Benedek (eds.) *New perspectives in Perspectives and Conceptions of International Law: An Afro European Dialogue*, (Wien and New York: Springer-Verlag,1983) 134-146 and U. O Umozurike, *The African Charter on Human and Peoples' Rights* (The Hague, Boston, London: Martinus Nijhoff Publishers,1997) Chapters 2, 5, 8, 9.

> (d) The right to be tried within a reasonable time by an impartial court or tribunal.
> 2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.'

Article 7 is lauded by some as containing due process rights.[5] These due process rights do exist in Article 7 (1) (a)-(d) namely the right to appeal, the presumption of innocence, the right to defence counsel and the right to be tried within a reasonable time. Closer scrutiny, however, reveals that Article 7(1) is inadequate both from an international and traditional perspective. From the international perspective, the Charter has been criticised for excluding the concept of procedural fairness in Article 7.[6] This has led Heyns to suggest that the absence of Article 14 ICCPR rights such as the right to a public hearing may indicate that their observation will be left to the 'creative' interpretation of the Commissioners.[7] In *Free Legal Assistance Group v Zaire*[8] the Commission decided that trials should be fair as a whole, indicating that Article 7 includes all the rights in Article 14 ICCPR, even those not explicitly defined. Still, Article 7 (1) does not explicitly extend procedural rights to the sentencing phase.

From a traditional perspective, the Preamble to the Charter takes into consideration the 'values of African civilisation' that ought to exert their 'influence' on the concept of human and peoples' rights (Paragraph 4). However, the Charter does not spell out anywhere *what* these 'African' values are, nor does Article 7 (1) refer to them. The Commission has likewise failed to link the African values to the right to a fair trial, which it still interprets in an international context. For example in *Krischna Achutan and Amnesty International v Malawi,* the Commission heard that Vera and Orton Chirwa were tried for treason before a Malawian Southern Region Traditional Court, but both were denied legal representation. Their sentences of death were upheld by the national Traditional Appeals Court despite its criticism of aspects of the trial procedure

[5] J. C Mubangizi, 'Towards A New Approach to the Classification of Human Rights with Specific Reference to the African Context' (2004) 4 (1) *African Human Rights Journal* 93-107, 102. A full examination of Article 7 is undertaken by F. Ouguergouz, *The African Charter of Human and People's Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (The Hague, New York: Kluwer Law International, 2003) 132-152 .

[6] M. C Bassiouni (1992-1993) *op cit* 268.

[7] C. Heyns, 'Civil and Political Rights' in M. D Evans and R. Murray (eds.), *The African Charter on Human and Peoples' Rights: The System In Practice, 1986-2000* (Cambridge: Cambridge University Press, 2002) 155-163. Others are the right to an interpreter and the right against self incrimination.

[8] *Free Legal Assistance Group v Zaire* Communication 25/89, 47/90, 56/91, 100/93 (1995) also cited *ibid* at 156.

followed in the lower court.[9] The Commission found that the applicants were not accorded a fair hearing because they were denied legal representation and thus the trial was a violation of Article 7 (1).[10] Clearly the Commission's decision did not take into account the African value of *Ubuntu* where traditional proceedings do not have legal representation because they are not a product of jurists.[11] Then again, *Krischna Achutan* referred to *statutory* traditional courts regulated by national legislation.[12] Nonetheless, *Achutan* shows the Commission did not engage in 'creative' interpretation, by drawing on 'values of African civilisation' on which statutory traditional courts are grounded. This lack of clarity concerning 'values of African civilisation' in the Charter and the Commission decisions is evident in the travaux preparatoires.

(ii) The travaux preparatoires

From the outset, the travaux preparatoires of the Charter reflected the lack of *direct* engagement with African values. Though couched in 'Africanist' terms, the Charter appeared to curtail African values in favour of provisions that stress international 'Western' values. The outcome was a weakened Article 7(1) arising from a combination of factors, both political and pragmatic.

The Charter was a creation of the Organisation of African Unity (OAU) - an assembly of African Heads of Government. The OAU was formed in 1963 by African states fighting for independence from colonial rule.[13] One of the principles of the Charter was a struggle to protect their hard won political independence.[14] The

[9] *Krischna Achutan (on behalf of Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*, Communication Nos. 64/92, 68/92, and 78/92 (1995) para. 2.
[10] *Ibid*, para 10.
[11] R. Mqeke referred to in Ch. 2 S. 2 (iii) *op cit*.
[12] B. Wanda's phrase: 'statutory traditional courts' concisely distinguishes traditional courts created by statute, from indigenous traditional courts that still operate in local communities but without legal recognition: B. P Wanda, 'The Role of Traditional Courts in Malawi' in P. N Takirambudde (ed.), *The Individual under African Law*, Proceedings of the first All Africa Law Conference (October 11-16, 1981, Kwasuluseni: University of Swaziland, 1982) 79. Emphasis is mine.
[13] R. Murray, *Human Rights in Africa: From the OAU to the African Union* (Cambridge, Cambridge University Press, 2004) 7-9.
[14] Charter of the Organisation of African Unity, May 25, 1963, 479 U.N.T.S. 39, 2 I.L.M 766 (OAU Charter) Article III (2) stating the principles of the OAU. The OAU was superseded by the African Union (AU) and the provisions of the Charter were adopted wholesale in the Constitutive Act of the African Union under Article 3 (h): The Constitutive Act CAB/LEG/23.15 adopted by the 36th Assembly of Heads of State and Government of the OAU in Lome, Togo, 11 July June 2000, came into force on 26th May 2001. Reprinted in 1 (2000) *African Human Rights Law Journal* 315.. The African Union eventually replaced the OAU in July 2000. For a historical analysis of the African Union and protection of human rights: R. Murray *ibid* chapters 1 and 2; also K. D Magliveras and G. J Naldi 'The African

subversion of African values was not the intention of the drafters of the Charter. On the contrary, the drafters (a Committee of Experts) were guided by a desire to reflect the 'African conception of human rights' that should 'take as a pattern the African philosophy of law and meet the needs of Africa'.[15] A similar statement appears in the Preamble to the Charter. President Senghor in his opening address also urged the drafters to draw inspiration from African traditions, requesting that a provision be made for duties in harmony with rights granted to the individual.[16] The drafters, however, recognised that it was 'prudent not to deviate too much from the international norms adopted in various universal instruments' by member states.[17] This explains why in its Preamble, the Charter reaffirmed some of the principles of the UN Charter and UDHR.[18]

The drafting history also shows that the Charter's content was based on other international instruments like the ICCPR and ICESCR.[19] There were also transplants from the American and European Conventions for Human Rights, like the right to a fair trial.[20] Interestingly, African heads of government argued that these 'western' principles were drafted without their participation, were not representative of an African version of human rights; representing instead another form of colonisation.[21] The fact that they acquiesced to these principles being incorporated in the Charter was pragmatic, arguably a result of external pressure.[22] Desiring to be part of the international community, African states bowed to the international voice championed

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Union- A New Dawn for Africa?' 51 (2002) *ICLQ* 415-425.

[15] OAU Doc.CAB/LEG/67/3, rev.1, at 1. An exhaustive account of the drafting is found in Ch. 1 in F. Ouguergouz *op cit*.

[16] OAU Doc.CAB/LEG/67/5. This request was honoured and appears in Article 27 discussed *infra*.

[17] *Ibid* at 2.

[18] The Charter *op cit* para. 3 of the Preamble.

[19] E. Kannyo, 'The Banjul Charter on Human and Peoples' Rights: Genesis and political background,' in C. E Welch and R. I Meltzer (eds.), *Human Rights and Development in Africa* (Albany: State University of New York, 1984) 128-151.

[20] B. O Okere, 'The protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems' (1984) 6 (2) *Human Rights Quarterly* 141-159, 153-154; Article 6 ECHR and Article 8 ACHR.

[21] N. J Udombana, 'Can the Leopard change its spots? The African Union Treaty and Human Rights' (2002) 17 *American University International Law Review* 1177-1261, 1209-1210.

[22] G. Bekker, 'The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States' (2007) 51 (1) *Journal of African Law*, 151-172, 151-152. She argues that the European states had a great desire for the African system to resemble the European model in a 'new civilising project in Africa'. J. Donnelly, 'The Relative Universality of Human Rights' (2007) 29 (2) *Human Rights Quarterly* 281-306, 291 makes an important point that states may be vulnerable to external pressure from 'culturally dominant powers' like the United States or Western Europe. They may be tempted or compelled to offer formal endorsements of international norms advocated by these powers. He describes this concisely as a hypocritical endorsement of international norms.

by the UN for a regional human rights mechanism.[23] The Charter's exhortation to states to consider the virtues of their historical tradition and values of African civilization was something of a forlorn rearguard action to assert their African identity.[24]

External pressure is only partly to blame. The combination of political problems, pragmatism and fear of deviating from international norms also resulted in a failure to incorporate communitarian values and reflect an African conception of rights in Article 7. In fact, the Charter has been criticised for assuming a static African culture and disregarding the fact that cultural values are socially and historically constructed in response to power relations and political struggles.[25] Such static construction has contributed in part to the absence of an African concept of rights as a 'living law' in its own right.

Another contributory fact was that in the drafting, the Commission was given a whittled down scope of oversight in keeping with the political imperative to minimise 'extreme interference' in the internal affairs of other states. In the first draft of the Charter, the Commission's role was limited to reporting communications to the Heads of Government who would decide what action to take on the recommendations.[26] This weak oversight was retained in the Charter provisions on the procedure of the Commission.[27] In *Legal Resources Foundation v Zambia* the Commission even affirmed that its jurisdiction is to examine domestic law and practice in the light of the Charter, but not to adjudicate on the legality or constitutionality of national laws.[28] The lack of support for the Charter as a regional human rights mechanism depicts how African States disregard their legal obligations to protect the rights of their citizens.[29] That notwithstanding, there is a lack of direct engagement with African values, specifically communitarian values, in the Charter that I discuss next.

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[23] G. Bekker *ibid* 154 note 11.

[24] Preamble *op cit* para.4. Assertion of African identity can be found in instruments like the *Grand Bay (Mauritius) Declaration and Plan of Action* (1999) in which the 1st OAU Ministers Conference call for integration of positive traditional and cultural values into the human rights debate: Para 5.

[25] M. Mutua, 'The African Human Rights System in a Comparative Perspective: The Need for Urgent Reformulation' (1993) 5 *Legal Forum* 31, reproduced in (1993) 3 *Review African Commission of Human and Peoples' Rights* 5, 7.

[26] O.A.U Draft African Charter on Human and Peoples' Rights, Introductory Statement: CAB/LEG/67/3.II 3.

[27] Charter *op cit* Articles 46-59. A. V Der Mei, 'The New African Court on Human and Peoples' Rights: Towards an Effective Human Rights Protection Mechanism for Africa?' (2005) 18 (1) *Leiden Journal of International Law* 113-129, 116-117.

[28] *Legal Resources Foundation v Zambia* Communication 211/98 (2001) para. 59.

[29] C. A Odinkalu, 'Back to the future: The imperative of prioritizing for the protection of human rights in Africa' (2003) 47 *Journal of African Law* 1-37, 25-26.

(iii) Balancing duties and protection of individual rights

As we saw in Chapter 1, my definition of procedural rights that apply in sentencing[30] is intended to encompass both individual rights and communitarian values. Communitarian values in my thesis comprise a legal dimension as 'rights' that are intrinsic to the holder but exercised communally, like the duty of kin and reconciliation. I argue here that the Charter is not grounded in the philosophical foundations that underpin communitarian values namely the African notion of human rights- *Ubuntu*. The result is a tenuous relationship between individual rights, duties and communitarian values.

(a) Duty toward family and society

Communitarian values are alluded to in Article 27(1) where an individual has duties towards his family and society (among other entities). This provision replicates the duty of the individual in Article 29 UDHR. At first blush, Article 27(1) stresses an incontrovertible duty to kin by the individual. On closer scrutiny, Article 27(1) is of minimal legal importance. It does not set out the precise duties owed by the individual, towards these entities listed.[31] Equally, Article 27(1) does not specify the manner in which duties could be balanced with individual rights during trials. Moreover, it leaves the concept of duty open to abuse.[32] For instance, some argue that the concept of duties raises the theoretical danger that states might capitalise on it to violate individual rights.[33] These fears are discounted by Mutua who points out that states violate rights because of insecure regimes.[34] He argues, rightly in my view, that criticism should instead focus on the meaning of duties, and clarify their moral and legal dimension in

[30] My definition is inclusive of S. Zappala's proposal (2003) *op cit,* for specific procedural rights in sentencing, discussed in Ch. 2 S.3 (v) *op cit*.
[31] F. Ouguergouz *op cit* at 401, 413.
[32] R. Gittleman, 'The African Charter on Human Rights': A Legal Analysis' (1982) 22 *Virginia Journal of International Law* 667-714.
[33] H. W Okoth-Ogendo, 'Human and Peoples' Rights: What Point is Africa Trying to Make?' 74, 78-79; and R. Cohen 'Endless Teardrops: Prolegomena to the study of Human Rights in Africa' in R. Cohen, G. Hyden and W. Nagan (eds.), *Human Rights and Governance* (Gainesville: University Press of Florida, 1993) at 15. E. G Bello, 'The African Charter on Human and Peoples' Rights: A Legal Analysis' (1985-V) Vol. 194 *Recueil des Cours* 9-268, 161.
[34] M. Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 339-380 note 13, 14. Also M. Mutua 'The African Human Rights System: A Critical Evaluation' (2000) at 12, available at www.hdr.undp.org/docs/publications/background_papers/MUTUA.PDF visited on 25/10/2005.

the enforcement of rights.[35] I take the view that both dimensions must be understood as part of trial procedure. Still, the Commission has not given guidance on the scope of duties. Without such a definition, it is difficult to resolve the tension between principles of autonomy and equality that underpin Article 7 (1) and principles of group rights and reconciliation that underpin the duty to society in Article 27(1).

(b) Safeguarding rights of others

Article 27 (2) provides that the rights and freedoms of individuals shall be exercised: 'with due regard to the rights of others, collective security, morality and common interest.'[36] For Mutua, this means that individual rights may only be exercised after 'balancing' them with rights of the community and in conjunction with duties of the individual and community.[37] The Commission in *Constitutional Rights Project, et al v Nigeria* has interpreted Article 27 (2) to mean that any limits placed on an individual's right to protect the rights of others, must be strictly proportionate to the advantages that follow.[38] In *Media Rights Agenda and another v Nigeria* the Commission clarified that restrictions should be based on a legitimate public interest. Moreover, the rights should not be rendered illusory.[39] This decision has been followed in *Interrights, et al v Mauritania*.[40] The Commission's decisions are based on the liberal approach discussed previously in Chapter 3. However, the Commission has not stated what safeguards exist to protect an individual from duties that may subvert individual rights in favour of the rights of 'others'.

[35] *Ibid*. C. Heyns and F. Viljoen concur, pointing out that the concept of duties requires re-formulation and rethinking the scope of the content: 'The Regional Protection of Human Rights' in P. T Zeleza and P. J McConnaughay (eds.), *Human Rights, the Rule of Law, and Development in Africa*, (Philadelphia: University of Pennsylvania Press, 2004) 140.

[36] Duties of the individual are meant to be enjoyed in association with others under Article 9: UN Declaration On The Rights And Responsibilities Of Individuals, Groups And Organs Of Society To Promote And Protect Universally Recognised Human Rights And Fundamental Freedoms: General Assembly Res 53/144, 8 March 1999.

[37] M. Mutua (2000) *op cit* 8. Community is used here by Mutua in a wider context to include the state, other communities and the individual community.

[38] *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria* Communications 140/94, 141/94 and 145/95, (1999) paras. 41-42.

[39] *Media Rights Agenda and Constitutional Rights Project v Nigeria* Communication 105/93,128/94, 130/94 and 152/96 (1998) paras. 67-70 adding that infringement of the right cannot be justified by emergencies or special circumstances.

[40] *Interights, Institute for Human Rights and Development in Africa, and Association Mauritanienne des Droits de l' Homme v Islamic Republic of Mauritania*, Communication 242/2001, (2003) para 78.

(c) Traditional, cultural, spiritual values

The term 'traditional' and 'cultural' values, used in Articles 17(3) and Article 29(7) are not synonymous with communitarian values. This is because both articles lack a clear definition of *what* these values are. Article 17 (3) only places a duty on the state to promote and protect traditional values recognised by the community but does not define traditional values in the communitarian context where the clan collectively protects its interests and that of the individual. So the disparity with Article 7 (1) remains. The Commission on its part in *Malawi African Association and others v Mauritania* emphasised the value of language as an integral part of culture and a cultural right under Article 17.[41] According to Murray and Wheatley, the Commission interpreted Article 17(3) to include protection of language where such rights did not exist.[42] This decision is important given the problems inherent in the non-use of local language in a trial.

Under Article 29 (7), the individual has to 'preserve and strengthen positive African cultural values in his relations with other members of the society (…)'. However, the positive cultural values are not defined. Ouguergouz offers an expansive reading of Article 29 (7). For him, Article 29 (7) should not defeat the aims of the Charter by limiting an individual's rights. Ouguergouz singles out the real danger in Article 29 (7): it does not specify the content of positive values, in light of negative traditional practices.[43] If we extrapolate his reasoning to Article 7 (1), then this provision leaves open the question of protection of individuals from abuse under traditional justice processes.

Pityana argues that duties, like those spelt out in Article 29 (7), are moral rules not legal norms.[44] Nonetheless, I view these duties as part of the Charter though of a different normative order because of the moral rules they encompass. Moral duties are quite separate from communitarian values in sentencing. They are moral safeguards in

[41] *Malawi African Association and Others v. Mauritania, African Commission on Human and Peoples' Rights*, Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000) paras 136-137.

[42] R. Murray and S. Wheatley, 'Groups and the African Charter on Human and Peoples' Rights' (2003) 25 *Human Rights Quarterly* 213-236, 224-225.

[43] F. Ouguergouz *op cit* at 407, 415-416. He also gives the example of female excision as a negative traditional practice. M. Senyonjo, 'Culture and the Human Rights of Women in Africa: Between Light and Shadow' (2008) 5 (1) *Journal of African Law* 39-67 at 44 points out that positive African values under Article 29(7) are consonant with principles of equality and non-discrimination.

[44] N. Pityana, 'The Challenge of Culture for Human Rights in Africa: The African Charter in a Comparative Context' in M. Evans and R. Murray (eds.), (2002) *op cit* 230-231.

the sentencing process. In this sense, duty to the community in Article 29 (7) could be construed expansively to include a duty to participate in trials in a manner that promotes societal equilibrium. Such an interpretation, however suggests giving preference to the moral duty to preserve the cultural values and wellbeing of society, while arguably removing individual choice and autonomy.

Mubangizi points out another weakness in the Charter, namely that there is no direct reference to spiritual 'rights'. Certain cultural practices, he argues, are expressed in spirituality that is enjoyed in connectedness with others.[45] In fact, Article 29 (7) gives little guidance on how spiritualism and the role of ritual are applicable as a procedural safeguard. In the absence of explicit provisions in Article 7 (1), it is difficult to argue that cultural values are meant to have a more direct connection to trial procedure. However, to achieve an overarching merger of two paradigms, Pityana and Ouguergouz's arguments seem convincing that duties should be understood as reinforcing rights.[46] This could give individual rights prominence over duties and the criteria for applying duties would ensure it does not infringe on individual rights. Nonetheless, I must emphasise that the dilemma of reconciling individual rights with collective rights and responsibilities has not been resolved in the Charter and is not unique to the African human rights mechanism as I demonstrate in Section 5 (ii).[47]

The above analysis shows the Charter's unclear position on protecting communitarian values during trials. The Charter does not define traditional and cultural values in the context of the trial. Furthermore, Article 7 (1) does not harmonise individual rights, duties (Article 27) and the rights of others (the clan) under Article 29 (7). Lack of guidance from the Commission exacerbates the problem. This may arguably place communitarian values in a stronger position in relation to individual rights, thus creating a problem of conflict of interests. Let us see how the Guidelines have addressed this problem in Section 3.

[45] J. Mubangizi *op cit* 105-106.
[46] N. Pityana *op cit* 229 and F. Ouguergouz *op cit* 420-421.
[47] S. Greer *op cit* for example, gives an exhaustive account of the legal challenges faced by the European Court of Human Rights in attempting to reconcile individual rights and collective or public interests: *passim*. Also S. Greer, 'What's wrong with the European Convention on Human Rights?' (2008) 30 *Human Rights Quarterly* 680-702, 696-701.

Section 3: The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa

The Guidelines are a critical part of the African human rights framework, described as an 'important normative reference and interpretation aid' on the right to a fair trial.[48] I argue in this section that though the Guidelines adequately discharge this mandate, since international human rights norms continue to dominate its provisions, the underlying tensions between individual rights and communitarian values are not resolved.

(i) The Negotiation process

The Commission adopted the Guidelines in order to strengthen Article 7 and reflect international standards. This was based on the Commission's mandate to formulate principles to solve legal problems relating to human rights and freedoms.[49] Upon these principles African states could base their legislation. From here the Guidelines evolved.

The history of the Guidelines can be traced to a workshop in October 1992. The recommendations therein were that the right to a fair trial in Article 7 needed to have its content changed to conform to other international instruments.[50] This was taken up and subsequently the Commission adopted the *Resolution on the Right to Recourse and Fair Trial* in March 1992.[51] In it the Commission considered that Article 7 included

[48] M. Baderin, 'Recent Developments in the African Regional Human Rights System' (2005) 5 (1) *Human Rights Law Review* 117-149, 125.
[49] Paragraph 1 of the Guidelines *op cit* on the Commission's mandate in Article 45 (1) (b) of the Charter, and Paragraph 3 of the Preamble to the Guidelines *op cit.*
[50] This workshop was organised by the International Commission of Lawyers. The Fifth Annual Activity Report states briefly that at the 11th Session, the Commission considered the 'Right to Recourse Procedure and Fair Trial' (Article 7): para.22 (1). It also states that at the 10th Session, the Commission decided to organise some seminars that included 'The right to a fair trial with special reference to legal assistance': para.13 (3). The 5th Activity Report is available in R. Murray and M. D Evans (eds.) *Documents of The African Commission on Human and Peoples' Rights* (Oxford-Portland Oregon: Hart Publishing, 2001) 216-217.
[51] *Resolution on the Right to Recourse and Fair Trial* ACHPR /Res.4 (XI) 92:11th Session in Tunis, Tunisia 2-9 March 1992.

other elements of a fair trial like equality before the courts. The Resolution also recognised that the right to a fair trial is 'essential for the protection of fundamental human rights and freedoms'.[52] The Commission then organised an international seminar on the Right to a Fair Trial in 1995.[53] Shortly thereafter, the *Resolution on the Respect and Strengthening of the Independence of the Judiciary* was adopted in March 1996.[54] In it the Commission exhorted African states to safeguard the independence of the judiciary. As we shall see, both Resolutions were highly influential in the subsequent seminar on the Right to a Fair Trial in Africa. This seminar was organised by the Commission in collaboration with International Non Governmental Organisations - Interrights and the African Society of International and Comparative Law.[55]

The outcome was the *Dakar Declaration on the Right to a Fair Trial in Africa*[56] that was adopted by the *Resolution on the Right to Fair Trial and Legal Assistance in Africa* in 1999.[57] This Resolution recalled previous Resolutions of 1992 and 1996 and noted the recommendations of the Seminar on the Right to a Fair Trial.[58] A Working Group on Fair Trial was then set up, comprising members of the Commission and Non governmental organisations. Its mandate was to prepare a draft of general principles and guidelines on the right to a fair trial and legal assistance to be presented for consideration by the 28th Session.[59] After several years, the Working Group presented its report, and the Guidelines were adopted by the Commission in 2003.[60]

The Dakar Declaration is instructive because it set down the normative standard for the transplantation of fair trial rights to traditional courts: the principle of universality and non derogation of the right to a fair trial.[61] Of significance is paragraph

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[52] *Ibid*, Preamble paras 1, 2 and 5. The Commission undertook to further elaborate the right to a fair trial.
[53] Cairo, December 1995. This was in collaboration with the Arab Lawyers Union. The Recommendations are not available.
[54] *Resolution on the Respect and Strengthening of the Independence of the Judiciary* ACHPR/Res.21 (XIX) 96 adopted at the Nineteenth Ordinary Session in Ouagadougou, Burkina Faso March 1996.
[55] The seminar was held in Dakar, Senegal (9-11 September 1999).
[56] The text of the *Dakar Declaration* can be found in (2001) 45 *Journal of African Law* 140-142.
[57] *Resolution on the Right to Fair Trial and Legal Assistance in Africa* ACHPR/Res.41 (XXVI) 99 adopted at the 26th Ordinary Session Kigali, Rwanda 15 November 1999 and appended in Annex IV, 13th Annual Activity Report of the Commission (1999) pages 43-44.
[58] Preamble of the *Resolution on the Right to Fair Trial op cit.*
[59] *Ibid* paras. 3, 4 and 5.
[60] *The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, DOC/OS (XXX) 247, adopted by the Commission at its 33rd Ordinary Session 15th-29th May 2003 Niger: 17th Activity Report para 6.1. The Guidelines were later adopted by Heads of State at the second Summit of the African Union: Maputo July 2003.
[61] Preamble to the *Dakar Declaration op cit.*

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> 'It is recognised that traditional courts are capable of playing a role in the achievement of peaceful societies and exercise authority over a significant proportion of the population in African countries. However, these courts also have serious shortcomings, which result in many instances in a denial of a fair trial. Traditional Courts are not exempt from the provisions of the African Charter relating to fair trial'.[62]

The principle of universality and non derogation on which the Dakar Declaration is grounded, is suggestive of an inherited normative standard that excludes any possibility of integration with communitarian values. This inherited normative standard, reflected in paragraph 4 is based on the superiority of international procedural law. The proclamation that traditional courts are not exempt from the Charter depicts the superimposition of one normative standard on another. Paragraph 4 also portrays a lack of appreciation of African values and procedures as legitimate in themselves. This point is exemplified in the resolutions accompanying the Declaration where for example, state parties are enjoined to work with local communities to address issues within traditional courts that are 'obstacles to the realisation of the right to a fair trial'.[63] Defining traditional procedures as 'obstacles', arguably reflects a lack of appreciation of its positive values that could be harnessed to achieve an expanded notion of international procedural rights. This contradicts the acknowledgement in paragraph 4, of the pervasive jurisdiction of traditional courts in Africa.

The participants at the Dakar Seminar relied on the 1992 Tunis Resolution, the 1996 Ouagadougou Resolution and the 1995 Cairo Recommendations as a basis for their deliberations.[64] Yet these resolutions are devoid of references to communitarian values, so reliance on them suggests that the participant's deliberations were not informed by empirical work on the strengths of traditional restorative justice. A subsequent study by the Institute for Security Studies, examined access to justice in legally recognised religious and traditional courts in Africa. Although the basis of the investigation was paragraph 4 of the Dakar Declaration, the study cited only one instance where these traditional courts do not follow procedural requirements for fair trials. This was the absence of legal counsel in Sharia (religious) courts in Nigeria.[65]

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[62] *Ibid*, para.4.
[63] *Dakar Declaration and Recommendations* available at: http://www.chr.up.acza/hr_docs/african/docs/achpr/achpr2.doc (visited on 6/11/2007).
[64] *Ibid*, Explanatory notes on the Recommendations.
[65] Institute of Security Studies 'Access to justice' at 88, in 'African Commitments to Human rights',

The study however acknowledged that the formality and bureaucracy of national court procedures encourages people to use traditional courts. In Ghana, for instance, the village and traditional chiefs carry out mediation and enforcement of tribal laws.[66] This suggests that the reverse is true: national courts may themselves be obstacles to procedural justice, by failing to engage with traditional restorative processes and communitarian values. This is one of the reasons why the locals prefer traditional courts.

Resolutions such as that on fair trial overlook the fact that in some countries, traditional or clan courts are not legally recognised by the state as a 'structure' capable of providing redress for violations of rights. This lack of legal recognition is compounded by the Commission's stance. For example, in defining the positive obligations of states in *Dawda Jawara v The Gambia*, the Commission held that rights and freedoms of individuals can only be fully realised if the government provides structures for redress.[67] Furthermore, the deliberations at Dakar on factors affecting the realisation of fair trial show that participants considered only political, social and economic factors. Participants did not specifically refer to communitarian values or traditional clan law. Therefore they do not appear to consider indigenous traditional courts as part of the national legal structures.

Let us elaborate further on the imposition of international normative standards in the Dakar Declaration. The drafting process reveals that during the deliberations, there was emphasis on international law only. In particular, the influence of international Non Governmental organisations steered the discussions towards protection of international rights.[68] For example, at the 31st Session in 2002, Interrights presented guidelines on access to justice and fair trial from which the Commission prepared its final draft.[69] This sequence of events suggests that the Commission had limited influence on the outcome of the seminar. They do not seem to have strongly advocated for an African notion of procedural rights to a fair trial. In their report, Interrights

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Paper 0584 ISS available at http://www.issafrica.org/pubs. Visited on 27/10/2007

[66] *Ibid*, 88-89.

[67] *Dawda Jawara v The Gambia*, Communication No. 147/95 and 149/96 (2000) para 74.

[68] Interrights, African Society of International and Comparative Law and *Rencontre Africaine pour la Defense des Droits de l'Homme* (RADDHO) mentioned in Regional Programmes, Africa (2004) *Interrights Bulletin* 6-7,7 available at http://www.interights.org/africa-programme/index.htm visited on 22nd May 2007, appear to have been very influential in organising the seminar on the right to a Fair trial in Dakar.

[69] *Ibid*, 6-7.

surmise the success of the Fair Trial seminar: 'with the Commission *fully* taking up the recommendations *we* made and consulting with the Working Group we set up to ensure those recommendations were implemented.'[70] Deliberations of the Working Group are not available for scrutiny, so the extent to which the Commission considered African communitarian values for inclusion in fair trial rights is unknown. Still, the drafting process depicts the external pressure the Commission was under to promote international rights. This may explain why the final document makes no mention of communitarian values or traditional restorative processes.[71] This is not surprising given the fact that right from the evolution of the Charter, the human rights agenda in Africa has been a consequence of intensive lobbying by international organisations and European countries.[72]

The promotion of an international procedural rights paradigm that appears to 'sideline' African normative standards arises where the latter are out of line with international procedural standards. In that situation international law, typically tries to get it to conform. In that respect, the adaptation of the Guidelines is typical of the modus operandi of the Commission.[73]

(ii) A critique of the Guidelines: Underlying tensions

I now set out the context within which my critique of the Guidelines is made.[74] Section A for instance, incorporates all of Article 14 ICCPR provisions, setting out the general principles applicable to a fair and public hearing.[75] Section N (6) relates more specifically to criminal charges and largely replicates Article 14 (3) ICCPR rights like

[70] *Ibid*. Emphasis is mine.
[71] The Guidelines *op cit* S. Q on Traditional courts.
[72] G. Bekker *op cit* 154.
[73] Other Resolutions produced this way include the *Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment of Punishment in Africa* (The Robben Island Guidelines- ACHPR/Res.61 (XXXII) 02). These guidelines were made under Article 45 (b) but lobbied for by the Association for the Prevention of Torture (APT). J. Mujuzi 'An Analysis Of The Approach To The Right To Freedom From Torture' (2006) 6 *Africa Journal of Human Rights* 423-441, in his historical account and analysis of the travaux preparatoires, traces the proposal on the Robben Island guidelines from the APT to the Commission at 438-439. The guidelines adopted at the 32 Ordinary Session lack a distinctive provision on the integration of communitarian values. However African Scholars did push for the pre-trial procedural safeguard to ensure that all persons deprived of their liberty can be visited by family members: para 31. Such a provision is not found in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by G. Ass. Res 39/46 of 10 December 1984 and entered into force on 26/06/1987.
[74] The relevant sections of the Guidelines are set out in Appendix 6.
[75] Guidelines *op cit* Section A paras. 1-5.

the right to equality of arms and the right to be tried in the accused's presence.[76] Section N also prescribes rights pertaining to the sentence itself like the right to benefit from a lighter sentence, but *not* rights to the deliberation of sentence.[77] Additionally, there are provisions on the sentencing of children, expectant mothers and mothers of infants.[78] The right of appeal is in Section N (10). That notwithstanding, the right to a fair trial is restricted to presentation of pleas and indictment *during* trial.[79] Section P (g) recognises 'informal' mechanisms like traditional practices that may be applied. Finally, Section Q (a)–(e) gives guidelines to traditional courts on the application of due process safeguards based largely on the provisions of Article 14 ICCPR.

The drafting background helps us understand why communitarian values have not been imported into the Guidelines. This is not surprising give the fact that the Guidelines are meant primarily to bolster provisions on the fair trial in the Charter 'and to reflect *international* standards*'*.[80] Their secondary function is to attempt to broaden state obligations to cover traditional courts. To this end, the Guidelines are to be incorporated into domestic legislation by State parties to the Charter.[81] Although the targeted audience are African states and its peoples, the influence of international human rights on the Guidelines is pervasive.

(a) Pervasiveness of international procedural rights

The Guidelines have no explicit provision for the application of communitarian values. This raises the question of how a court can ensure procedural justice if it wishes to apply an expanded notion of rights. The only provision that refers to traditional restorative processes, albeit tangentially, is Section P that largely incorporates the text of the UN *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.[82] Section P recognises informal mechanisms, including traditional or customary

[76] *Ibid*, Section N (6) (a)-(g).
[77] *Ibid*, paragraphs (7)-(9) The lighter sentence applies only if subsequent to the commission of the offence, the law is amended to impose a lighter penalty. S. N para 7 (a) also restates Article 7 (2) of the Charter *op cit* that proscribes *ex post facto* (retroactive) criminal laws and punishments.
[78] *Ibid*, S. N para. 9 (a)-(e). It also defines persons to whom the death penalty should not be applied.
[79] As I stated in Ch.1 S.3, *op cit*, sentencing is a separate phase of the trial.
[80] Preamble to the Guidelines, *op cit*, para 3. Emphasis is mine.
[81] *Ibid* para. 6.
[82] UN *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power:* G.A Assembly Resolution 40/34 29 November 1985.

practices that seek conciliation and redress for victims.[83] On a first reading such wording adequately describes the aims of traditional restorative justice with its emphasis on reparation for victims.[84] On a second reading, two issues emerge.

First, the use of the term 'informal' mischaracterises the traditional model where evidence is adduced, evaluated and offenders punished in what is a recognized local process. Furthermore, that traditional mechanisms may be applied 'where appropriate' under Section P (g), implies a discretionary process, quite unrepresentative of the traditional restorative process. Second, and most crucially, there is no mention of the community's role. This is because the scope of procedural equality is defined in yet another section: Section N (6) (a) as between the accused and prosecutor only. This adherence to the international notion of equality of arms subjugates the principle of participation on which communitarian values are grounded. So Section N (6) (a) excludes *public* participation in the sentencing procedure.

The Commission's decisions reflect the international emphasis on the individual right to a fair trial, and equality of arms as between two parties. For example, the definition of rights to equal treatment during the trial was explained in earlier decisions of the Commission, notably in *Avocats sans Frontieres v Burundi*:

> 'The right to equal treatment by a jurisdiction, especially in criminal matters, means in the first place that both the defence and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial. Simply put, they should argue their cases before the jurisdiction on an equal footing.'[85]

There, the discriminatory granting of adjournments by the court for grave offences against the accused was found to have violated the rights to equality of arms and fair trial.[86] This interpretation of equality of arms appears to 'emasculate' communitarian values and an 'African' concept of procedural fairness, because it is based on individualist legal definition of equality of arms.

The Commission has made few inroads in resolving this conundrum. For example, in the *Constitutional Rights Project* case, it decided that the Charter should be

[83] Guidelines *op cit* S. P (g) on Victims of Crime and Abuse of Power: 'Informal mechanisms for the resolution of disputes, including mediation, arbitration and traditional or customary practices, should be utilized where appropriate to facilitate conciliation or redress for victims.'
[84] *Ibid*, S. P (k) provides that where the offender cannot afford compensation, the State parties should endeavour to provide the compensation.
[85] *Avocats sans Frontieres (on behalf of Gaetan Bwampamye) v Burundi* Communication 231/99, (2000) paras. 26- 27.
[86] *Ibid* para. 29.

interpreted in a culturally sensitive manner taking into consideration the divergent African legal traditions.[87] This decision is important given the problems inherent in the Charter, though there is no guidance from the Commission in respect of communitarian values as part of the right to a fair hearing. So if a broader interpretation of the Guidelines is given, the Commission would not negate the universality of international procedural rights.

Pityana argues that all cultures have distinct values of rights but these are expressed in Westernised language and ideas.[88] Although I agree with him, I must point out that a distinct African value of rights (couched in any language) is absent from the Guidelines (and the Charter). Moreover, the Commission's decisions reflect the international position on the right to a fair trial. For example, in *Zegveld and Ephrem v Eritrea*, the Commission decided that the state must initiate legal proceedings that comply with fair trials standards as elaborated in the Guidelines.[89] This gives no leeway to take into account communitarian values or to reconcile the divergent normative standards.

(b) Failure to reconcile divergent normative paradigms

The challenge of protecting African values without trumping individual rights is well illustrated in Section Q that enjoins traditional courts to respect international standards on the right to a fair trial.[90] Traditional courts are also bound by the provisions in Section N on the rights during a trial and Article 14 ICCPR. A traditional court is defined under Section S (1) as:

> 'a body which in a particular locality, is *recognised* as having the power to resolve disputes in accordance with local customs, cultural or ethnic values, religious norms or tradition.'[91]

A first reading of this definitional section has led some to argue that its scope includes lower local and traditional courts in rural Africa.[92] This could include clan courts. A

[87] *Constitutional Rights Project* decision (1999) *op cit* at para 26. C. A Odinkalu, 'African Commission on Human and Peoples' Rights: Recent Cases' (2001) 1 (1) *Human Rights Law Review* 97-110, however sees this as a 'hardly exceptional point': 108.
[88] N. Pityana *op cit*, 227.
[89] *Liesbeth Zegveld and Mussie Ephrem v Eritrea* Communication 250/2002, (2003) para. 56.
[90] Guidelines, *op cit*, S. Q (a).
[91] *Ibid*. Emphasis is mine.
[92] M. Baderin *op cit* 126.

second reading in my view, implies that traditional courts under the Guidelines are those *legally* recognised by national judicial systems, but excludes those local courts that were abolished by law and continue to operate outside its parameters. This applies to countries like Uganda where the state usurped the jurisdiction of indigenous traditional courts and declared them illegal because of the uncertainty of the unwritten traditional customary criminal law.[93]

To prevent legal uncertainty, all traditional courts need to be brought within the ambit of national legislation. Moreover, it would be erroneous to assume that the earlier decisions of *Krischna Achutan*, is applicable to indigenous traditional courts operating *outside* national laws. The *Achutan* decision (made prior to the adoption of the Guidelines) strongly suggests that the Commission may only accept the validity of statutory traditional courts that are legally recognized by the state and bound to follow national trial procedures.

In a related matter, states are urged by the Guidelines to review their laws and practices to consider restorative and reparative sentencing options and 'restoration of rights'. As we saw in the previous section, traditional mechanisms or customary practices may be applied where appropriate.[94] The intention here is clearly to do more than protect *international procedural rights* as provided in Section N and Q. Still, some problems remain. The Guidelines are silent on how rights can be 'restored' within the context of restorative process, while protecting individual procedural guarantees before the traditional court. For example, under Section Q (b) (8) a defendant should be represented in all proceedings before the traditional court. This wording is *in pari materia* to Article 14 (3d) ICCPR and affirms the earlier decision of *Krishna Achutan*. The underlying challenge, as we discussed in previous chapters, is that traditional restorative process includes communitarian values of duty to kin. The Guidelines *contra*, treat the principles of equality of arms as pertaining solely to the relationship between the prosecutor and accused. Consequently, legal representation is for the defendant only and cannot be extended to give participative 'rights' of representation to a defendant's kin, or the community.

The Guidelines are also not clear on whether traditional rules of procedure and

[93] Ch. 1 S.5 *op cit* and Ch. 6 and 7 *infra*.
[94] Guidelines *op cit* S. P (g) (h) (i).

evidence are applicable.[95] For example, Section Q (b) (9) states that individual rights and obligations can only be affected by a decision based solely on evidence presented to the traditional court. Yet there are marked differences between the international and traditional justice models on such issues as the mode of presentation, admissibility of evidence and standard of proof. There is no provision in the Guidelines prescribing which law should prevail in the event of a conflict or inconsistency, so in the absence of a Commission's decision, the issue is moot.

In sum, the place for communitarian values within the regional rights framework and in the context of sentencing remains unclear. The travaux preparatoires gives insight into the politics, judicially inherited cultures and pragmatism that governed the drafting process and explains the Commission's weak oversight. Still, the wholesale transplantation of international procedural safeguards into the Guidelines strengthens its original purpose as an interpretative and normative guide on the right to a fair trial. The Guidelines, all the same, give little guidance on an African notion of procedural rights thereby failing to achieve a normative balance that promotes procedural justice acceptable to both systems. Two solutions exist. One option is for the state to legitimise traditional courts to bring them within the ambit of the Charter.[96] The other is for the Commission to interpret the Guidelines expansively using a doctrinal approach.

Section 4: The African Commission under the Microscope: Adherence to Precedent

In this section, I come to the second part of my argument. I argue that the African Commission has not given guidance (in its decisions) on resolving the normative contradictions because of a slavish adherence to the doctrine of precedent. This is despite the fact that sources of law available to the Commission include 'African practices that are consistent with international norms; customs generally accepted as law'; legal precedents and doctrine.[97] Deference to precedent leaves little

[95] Traditional courts do not apply national rules of evidence and procedure but their own customary rules: M. Baderin *op cit*, 126.
[96] This point is pursued further in Ch. 6 and 8 *infra*.
[97] The Charter *op cit*, Article 61. Article 45 (1) (c) also enjoins the Commission to co-operate with international institutions on promotion and protection of rights. I suggest that both provisions are permissive so the Commission may apply them to give guidance on how African communitarian values

room to apply these other sources of law. Some argue that the Commission's decisions are binding on nation states.[98] Whatever their formal standing, at the very least the Commission's decisions are expected to give guidance on an African notion of procedural rights.

When it was set up in 1987, the Commission's mandate was inter alia to interpret the Charter on its initiative, or adopt Resolutions on specific provisions of the Charter.[99] The Guidelines are one example of a Resolution it has adopted. On the issue of interpretation, Odinkalu suggests that the Charter rights are formulated in broad terms giving the Commission unfettered discretion to interpret them.[100] However, there is little evidence that the Commission has used its discretion to draw on communitarian values that conform to the Charter.[101]

For example, in the *Civil Liberties* case the Commission claimed that in interpreting and applying the Charter, it relies on its own body of precedents and the provisions in Article 60 and 61.[102] The evidence instead shows the Commission's deference to precedent and doctrines from international and regional bodies like the Human Rights Committee, the ECtHR and the IACtHR. In this respect the jurisprudence of the Commission is conservative, following a trend identified by N. Miller's survey of application of precedent by international tribunals.[103]

It may seem disappointing that the Commission's decisions are hardly ever cited as precedent in international tribunals handling African conflict. This is not surprising given the uncritical manner in which it applies precedent. One such example is *Interrights (on behalf of Mariette Sonjaleen Bosch) v Botswana.* In discussing the

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fit within the international human rights paradigm.

[98] F. Viljoen and L. Louw, 'The Status Of The Findings Of The African Commission: From Moral Persuasion To Legal Obligation' (2004) 48 (1) *Journal of African Law* 1-22. M. Hansungule, 'The African Charter on Human and Peoples' Rights: A Critical review' (2000) 8 *African Yearbook of International Law* 315-316: discusses the import of the findings based on provisions of the Charter.

[99] E. Ankumah, *The African Commission on Human and Peoples' Rights* (The Hague: Martinus Nijhoff, 1996) 26. Also R. Murray, *The African Commission on Human and Peoples' Rights and International Law* (Oxford- Portland Oregon: Hart Publishing, 2000) 25. Murray gives an extensive appraisal of the workings of the Commission as a framework for studying opposing dichotomies in her book.

[100] C. A Odinkalu, 'Africa's Regional Human Rights System: Recent Developments and Jurisprudence' (2002) 2 (1) *Human Rights Law Review* 99-116, 105-106. He also observes that the Commission asserted its role as custodian of interpretation and evolution of the Charter which is broader that the original role of finder of fact: referring to *Legal Resources Foundation v Zambia* Communication 211/98, paras. 62.

[101] B. Okere *op cit* 149 urges the Commission to draw from African practices that are consistent with international human rights norms.

[102] *Civil Liberties op cit* para 24. Article 60 of the Charter *op cit* empowers the Commission to draw on international human rights law among other sources.

[103] N. Miller (2002) *op cit*, discussed in Ch.4 S.6 *op cit*.

procedural requirements of the right to a fair trial the Commission relied extensively on Archbold's book and decisions of the ECtHR.[104] Yet another example is *Krishna Achutan* that does not discuss the conflict between traditional and international notions of the right to legal representation. Both decisions fail to give guidance on the conundrum of the hierarchy of rights and duties in the two divergent procedural frameworks. The Commission's decisions have been justifiably described as formulaic and lacking innovation because they do not refer to jurisprudence from national and international courts.[105] Their decisions rely even less on judgements of statutory traditional courts and certainly none from the 'unrecognised' traditional courts. Consequently, the Commission is blamed for failing to develop a truly African conception of human rights in its jurisprudence,[106] and its findings have been described as remote and virtually meaningless to those affected.[107]

R. Murray argues, quite rightly, that the Commission has made ground-breaking decisions in its interpretation of the Charter, for instance, holding that Article 7 on the right to a fair trial should apply to mental health patients.[108] In her view, the international law discourse is dominated by a Western perspective that is dismissive of the contribution of the Commission's jurisprudence.[109] While this is not in doubt, I maintain that the Commission's deference to influences from other legal and human rights traditions has resulted in a failure to develop a truly African jurisprudence. While it is true that sometimes the Commission exhibits an ability to apply procedural rights in a broad rather than narrow legalist sense, this type of 'overarching' interpretation is not extended to an African notion of procedural rights. This may be symptomatic of a desire to be in line with international laws so as not to seem recalcitrant.

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[104] *Interrights et al (on behalf of Mariette Sonjaleen Bosch) v Botswana* Communication 240/2001, (2004) para 24 citing Archbold, *Criminal Pleading, Evidence and Practice* 2000 edition at page 18 and *Salabiaku v France* (1988) 13 EHRR para. 27.

[105] M. Mutua, 'The African Human Rights Court: A Two-Legged Stool?'(1999) 21 *Human Rights Quarterly* 342-363, 348. The same criticism could be said of decisions of the ECtHR, described as reflecting a 'lack of coherence' due to a failure to take 'formal characteristics' of the ECHR seriously enough: S Greer (2006) *op cit* at 232.

[106] G. Bekker *op cit* 157, n. 27 demonstrating how the Commission relied heavily on pronouncements of the Committee on Economic Social and Cultural Rights, when called upon to deal with inclusion of economic and social rights in the Charter.

[107] C. A. Odinkalu and C. Christensen, 'The African Commission on Human and Peoples' Rights: the Development of its Non-State Communications Procedures' (1998) 20 *Human Rights Quarterly* 235-280, 235, 237. Also African Society of International and Comparative Law Report in the 16th Session (1996) 62-83.

[108] R. Murray, 'International Human Rights: Neglect of perspectives from African Institutions' (2006) 55 *ICLQ* 193-204, 200-202. The case is *Purohit and Moore v The Gambia* Communication 241/2001(2003).

[109] *Ibid*, 194-197.

I have argued that deference to influence from international tribunals and other legal traditions has robbed the Commission of an opportunity to shape African jurisprudence and depicts the lack of innovation in formulating guidance on grey areas like procedural rights in sentencing. It remains to be seen what doctrinal solutions may be available from the newly created African Court of Human and Peoples' Rights.

Section 5: Challenges to the African Court of Human and Peoples' Rights

The third part of my argument explains the challenge to the African Court of Human and Peoples' Rights (ACHPR), to develop a truly African jurisprudence. In this section, I suggest that the ACHPR could draw lessons on reconciling divergent normative standards in conformity with international human rights law from the IACtHR: a court whose composition is closest to it and which faces similar challenges.

Let me start with a brief background. The ACHPR was established as complementary to the Commission, by a Protocol to the Charter in 1998.[110] Following ratification by 53 African states,[111] the Protocol came into force on 25th January 2004, with the seat of the court established in Arusha, Tanzania. The Court of Justice of the African Union was later established in 2000, by the Constitutive Act that replaced the OAU Charter.[112] The Executive Council in 2005, then decided to merge the two courts, though the unification would not affect the coming into force and operations of the ACHPR. The merger following 'financial constraints',[113] took place in May 2006 after consultations among member states.[114] Finally a single court- the African Court of

[110] Article 5 (3) The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights: OAU Doc. OAU/LEG/EXP/AFCHPR/PROT(III) adopted by the African Union Summit on 9th June 1998. Article 2: the ACHPR is complementary to the Commission.

[111] A list of states that have ratified the Protocol is available at www.africa-union.org visited on 10/12/2008. It includes Uganda. A detailed analysis of the process of the creation of the ACHPR is given by G. Bekker *op cit* 159-171 and A. V Der Mei *op cit* 118-119.

[112] The Constitutive Act, *op cit* Article 5. The Protocol of the Court of Justice of the African Union was adopted on 11th July 2003 in Maputo, Mozambique. Only 12 out of the required 15 states have ratified the Protocol. For ratifications: www.africa-union.org, visited on 11/12/2008.

[113] Report of the Decision of the Assembly of the Union to Merge the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, Executive Council, Sixth Ordinary Session in Abuja, Nigeria 24-28 January 2005, EX.CLDec/162(VI) pp. 1 and 2 and the Assembly/AU/ Dec. 83(V) adopted in Sirte, Libya, July 4-5, 2005. I. Kane and A. C. Motala, 'The Creation of a New African Court of Justice and Human Rights' in R. Murray and M. D. Evans (eds.), *The African Charter on Human and Peoples' Rights: the system in practice, 1986-2006* (2nd ed.) (Cambridge: Cambridge University Press, 2008) 414-417, give an excellent critique of the decision to merge the two organs.

[114] *Decision on the Single legal instrument on the merger of the African Court on Human and People's rights and the Court of Justice of the African Union*, DOC.EX.CL/253 (IX).

Justice and Human Rights (ACJHR) was set up in 2008.[115] However, despite the fact that the ACJHR is not set up due to lack of sufficient ratifications, the ACHPR is now operational. The ACHPR has yet to hear any cases, but in July 2008, a second set of judges was appointed.[116] I now examine the law applicable.

(i) Law applicable

Under Article 7 of the Protocol establishing the ACHPR, the law applicable are the Charter and human rights instruments ratified by states.[117] The challenge to the judges, following my preceding analysis, is the sparse provisions of the Charter that fail to give a definitive concept of the 'African' procedural rights. Kane and Motala suggest that the jurisprudence of the merged ACJHR would better protect human rights, as it would be enriched through integration.[118] I agree with these views, and make the point here that both the ACJHR and the ACHPR should apply 'African practices consistent with international norms on human and people's rights' under Article 61 of the Charter.

The main doctrinal challenge will be the absence of relevant national jurisprudence.[119] The judges could build on the collected wisdom of traditional courts to prevent a 'copy and paste' of international human rights provisions. A better approach in my view is for the ACHPR (and the ACJHR) to draw lessons from the experience of the IACtHR based on similarities in the legal challenges they face.

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[115] Article 2 of the Protocol on the Statute of the African Court of Justice and Human Rights, adopted by the 11th Ordinary Session of the Assembly held in Sharm El-Sheikh, Egypt on 1st July 2008. A comprehensive account of the creation of the merged court is given by I. Kane and A. Motala *op cit*, *passim*.

[116] The Judges were elected for a term of 6 years by the 13th Ordinary Session of the Executive Council in July 2008. Among them is a Ugandan Judge Mr. Joseph T. Mulenga: Ref: BC/OLC/66.5.

[117] Article 3 of the ACHPR Protocol provides that the ACHPR's jurisdiction *ratione materiae*, extends to cases and disputes relating to the interpretation and application of the Charter and human rights instruments ratified by states. Under Article 28 (c) of the Protocol of the Statute of the African Court of Justice and Human Rights, the ACJHR shall have jurisdiction over inter alia, the interpretation and application of the African Charter; the Charter on Rights and Welfare of the Child, the Protocol to the Charter on the Rights of Women in Africa and other relevant human rights instruments ratifies by the States concerned. An in-depth appraisal of the draft statute is undertaken by I. Kane and A. Motala *op cit* 418-437.

[118] *Ibid*, 439-440. The authors also suggest that the ACPHR jurisprudence could encourage regional courts jurisprudence. However such courts like the East African Court of Justice set up under Ch. 8 of the East African Treaty (2000), have only indirect jurisdiction over human rights issues and therefore are of limited value in terms of human rights protection. A comprehensive legal analysis of the re-emergence of the East African Court since its demise in the 1970s is given by S. Mvungi, 'Legal Analysis of the Draft Treaty for the establishment of the East African Community' in S. Mvungi (ed.), *The Draft Treaty for the establishment of the EAC: A Critical Review* (Dar Es Salaam: Dar Es Salaam University Press: Dar Es Salaam, 2002) 65-82. Also B. Tusasirwe, *The East African Community (EAC) and Constitutional Development in 2002* found at http://www.kituochakatiba.co.ug/publication.htm (visited on 14/11/2007).

[119] This point is canvassed in Ch. 8 *infra*.

(ii) Experiences from the Inter American Court of Human Rights

The first similarity between the experiences of the ACHPR and the IACtHR is the existence of communities within member states that apply their own traditional laws and normative standards. In this regard, the situation in many American countries closely resembles that of African countries like Uganda, Rwanda or Sierra Leone. As M. Guzman points out, North and South America combined, have one of the largest numbers of indigenous peoples and ethnic groups in the world, with over 400 identifiable ethnic groups and peoples.[120] Each group applies their own customary laws. Guzman notes the challenge that this creates, of recognising that national and traditional systems exist along side each other: what is sometimes referred to as legal pluralism.[121]

The second area of similarity is in the human rights provisions. For example the American Convention on Human Rights (ACHR) has Article 32 that is similar to Article 27(1) and (2) of the Charter:[122]

> Article 32(1): 'Every person has responsibilities to his family, his community, and mankind.
> Article 32 (2): The rights or each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare in a democratic society.'

In interpreting the ACHR, the IACtHR has held that human rights are universal rather than culturally relative. To decide otherwise would deny the existence of core human rights.[123] The ACHR has no provisions equivalent to Section Q (a) in the Guidelines

[120] M. Guzman, 'Legal pluralism as an approach to Indigenous and Tribal peoples' rights' in L. Lindholt and S. Schaumburg-Muller (eds.), *Human Rights in Development Yearbook 2003: Human Rights and Local/Living Law* (Leiden, Boston: Martinus Nijhoff Publishers, 2005) 47-103 at 71 citing 'The Human Rights Situation Of The Indigenous Peoples In The Americas': Organisation of American States document OEA/Serv/LV/II.I.08 (2000).
[121] *Ibid*, 72.
[122] Article 32 on Relationships between Duties and Rights in the ACHR, entered into force 18 July 1978, 9. I. L. M 673. The similarity with the African Charter is noted by B. Okere *op cit* 153-156.
[123] '*Other Treaties' Subject to the Consultative Jurisdiction of the Court (Article 64 American Convention)* IACtHR Advisory Opinion: OC-1/82, 24 September 1982, (Ser. A) No.1, para. 40. J. M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge: Cambridge University Press, 2003) submits that adhering to cultural relativism could support human

that applies international rights to a fair trial on traditional courts. The IACtHR's jurisprudence, however, demonstrates how traditional (non state) laws can be integrated in awarding remedies to parties whose rights have been violated. This is an innovative approach to harmonising divergent normative standards. The IACtHR has made ground breaking decisions on rights of indigenous peoples.[124] Three principles in the IACtHR jurisprudence are of significance: participation of peoples in decisions affecting them; observance of indigenous customary law and cultural values; and application of indigenous case law to tribal and other peoples.[125]

A celebrated judgement on participatory rights is *Mayagna Awas Tigni Community v Nicaragua*.[126] The Awas Tingni people filed a case alleging that the government had violated among others, their rights to cultural integrity by logging timber in their native lands. In awarding their collective claim, the court recognised that indigenous peoples have the right to participate in decisions affecting them, observing that court decisions must reflect their customary law and culture.[127] In arriving at this decision, the court applied the Indigenous and Tribal Peoples Convention that provides that any action taken by a state should be with the participation of the people concerned.[128] Consultations on any action, some have persuasively argued, should be culturally appropriate and procedurally adequate by providing sufficient information to enable effective participation by the indigenous peoples.[129]

A second principle is that the court should consider the observance of customary law and cultural values.[130] For example, in the *Plan de Sanchez v. Guatemala* women and the elderly who were the repositories of the Mayan Achi culture

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rights violations: 329.

[124] J. M Pasqualucci, 'The Evolution of International Indigenous Rights in the Inter American Human Rights System' (2006) 6 (2) *Human Rights Law Review* 281-322, 281-282. The decisions relate to: where there are no domestic laws recognising indigenous peoples rights; where their rights are not protected; or where the state or third parties act with impunity and have taken away their land or committed other atrocities.

[125] *Ibid*, 287-291.

[126] *Mayagna (Sumo) Awas Tingni Community v Nicaragua* Inter Amer. Ct. H. R (Ser. C) 79 (2001) Inter-Am. Ct, H. R. (Series C) Judgment of August 31, 2001. Hereafter *'Awas Tingni*' case.

[127] *Ibid*, para 164.

[128] Applying Articles 2 and 5 of The Indigenous and Tribal Peoples Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries. The Convention was adopted on 27th June 1989 by the General Conference of the International Labour Organisation at its 67th Session and entered into force on 5th September 1991.

[129] J. Pasqualucci (2006) *op cit* 288 also citing J. Anaya, 'Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources' (2005) 22 *Arizona Journal of Intentional and Comparative Law* 7 at 16, in note 36.

[130] *Awas Tingni* case, *op cit* at para. 151.

were massacred. This interrupted the transmission of cultural knowledge to younger generations, and the survivors could not freely practice their tradition due to control of their activities by the Guatemalan military.[131] The court recognised the importance and value of Mayan Achi culture to its people's identity. As a form of reparation, it ordered that the culture be re-instated in the affected communities. The court also ordered the state to carry out a public act of apology in accordance with traditions and customs of the communities, translate the ACHR as well as the Merits and Reparations judgments into the Maya-Achi language, and disseminate the Maya-Achi culture through language institutes.[132] Also in *Aloeboetoe et al v Suriname*, the IACtHR ordered reparation in accordance with local cultural law of succession.[133]

The court has also established a third principle of applying indigenous case law to tribal and other peoples who have long held customs and traditions *similar* to those of indigenous people. In particular, the court has protected those groups who hold land communally and have a close spiritual and cultural relationship with their land. In *Moiwana v Suriname*[134] for example, the court applied case law it had developed in relation to the N`djuka Maroon community who were forced out of their tribal land by the Suriname army. The juridical worth of this decision is that where people have common customs, religious and spiritual practices, the court has granted protection under international law. These decisions have been justly hailed as progressive in protecting the rights of indigenous peoples.[135]

The IACtHR has also made ground breaking decisions in restorative justice. As D. Shelton points out, the procedural aspect of restorative justice in international law is in the bringing together of offenders and those affected by the harm as well as encompassing reintegration based on healing. Reparation is closer to restorative justice as a transformative social action because, she argues, the claimants view it as a

[131] *Plan de Sanchez Massacre v. Guatemala (Reparations)* Inter-Amer. Ct H.R. (Ser. C) 116 (2004) Judgement of November 19 2004 (Reparations) paras. 49 (12)-(13).
[132] *Ibid* paras. 6-9 taking into account considerations of the court in paras. 104-117.
[133] *Aloeboetoe et al v. Suriname* Inter. Am. Ct. H. R (Ser. C) No.15 Judgement of 10th September 1993, (Reparations) para. 66. Details are in the discussion on moral damages *infra*.
[134] *Moiwana village v Suriname* Inter. Amer. Ct. H. R. (Ser. C) 124 (Judgement of June 15, 2005).
[135] J. Pasqualucci (2006) *op cit* at 291 analysing the *Moiwana* case. She points out that the jurisprudence of the IACtHR, forces states to recognise and enforce rights of indigenous peoples to maintain their communal lands, culture and traditions: 321. M. Guzman *op cit* 74 also views decisions like *Aloeboetoe* and *Awas Tingni* as a major breakthrough in recognising legal pluralism in the region and protecting individual and collective indigenous people's rights.

commitment to acknowledge the wrong and redress the injury.[136] The substantive aspect is in redress like non monetary remedies that may include punishment, symbolic compensation, reconciliation including apologies, and ritual.[137] I agree with her reasoning and give some examples here.

The IACtHR has applied non monetary remedies like prosecution and punishment as a form of satisfaction and guarantee of non repetition. Claimants before the IACtHR have complained that their rights to a fair trial in Article 8 are violated when they (as victims) are not permitted to be a party to filing the criminal charges. Shelton doubts that the drafters intended this interpretation.[138] Nonetheless, the IACtHR has interpreted Article 8 ACHR to mean that victims have the right to have the violation investigated, offenders prosecuted and if found guilty, punished. Significantly, the proceedings must be procedurally fair.[139] For example, in *Plan de Sanchez* it was established that the victims had requested the state to investigate and prosecute the Army and police officers who carried out the massacre.[140] Nothing was done and the status of the criminal proceedings was not known even at the time of delivering the judgment. The state was ordered to investigate, prosecute and punish the perpetrators.[141]

Other remedies recognised by the IACtHR that give satisfaction to the victims include official condemnations and the erection of a monument in honour of the deceased.[142] In the *Plan de Sanchez Massacre*, the state was ordered to publicly honour the memory of the deceased who were Mayayan indigenous people and to take into account the traditions and customs of the affected communities in doing so.[143] Truth telling is another remedy. The IACtHR held in *Velasquez Rodriguez* that although human rights treaties do not provide for a 'right' to know the truth, such right is part of the duty of the state to protect citizen's rights.[144] This decision is particularly relevant to

[136] D. Shelton (2005) *op cit*. The substantive aspect is in redress including reconciliation and compensation, although the latter can be symbolic: 14-16, 464.
[137] *Ibid*, 16, 35-47.
[138] *Ibid*, 278.
[139] For example, *Paniagua Morales et al v Guatemala* (1998) 37 Inter-Am. Ct. H. R. (Ser. C) Judgement of March 8, 1998 paras. 155-6 and *Genie Lacayo* (1997) 30 Inter-Am. Ct. H.R. (Ser. C) Judgement of January 29, 1997 para. 76.
[140] *Plan de Sanchez op cit* Judgement of November 19 2004 (Reparations).
[141] *Ibid*, paras 49 (9) and 94-99.
[142] *Ibid*, 277, citing *Aloeboetoe op cit* (Reparations) 1993 and *Cantoral Benavides Case* (2001) 88 Inter-Am. Ct .H. R. (Ser. C) para 43.
[143] *Ibid*, para 100 -101.
[144] *Velasquez Rodriguez v Honduras*, Judgement of July 29, 1988 4 Inter Am-Ct-H-R (Ser. C), No.4

the African context because it resonates with the values of traditional restorative justice of establishing the truth before seeking societal equilibrium.

There is also the award of moral damages as a type of compensation.[145] The IACtHR coined the phrase 'moral damages' to include damages for emotional distress and changes to the life of victims and family.[146] In awarding moral damages, the IACtHR integrates cultural practices with international law in a manner that resonates with local communities. For example, in *Aloeboetoe v Suriname*, the Inter American Commission of Human Rights argued that the Saramaca tribe had suffered moral damage and were entitled to compensation:

> '(…) in the traditional Maroon society, a person is not only a member of his own family group, but also a member of the village community and of the tribal group. In this case, the damages suffered by the villagers due to the loss of certain members of its group must be redressed.'[147]

On the question of allocation of the damages, the IACtHR grappled with the problem of which law to apply in order to identify who would qualify for the compensation. The Court decided to apply a 'choice of law principle' in which the traditional customary law of the Saramakas tribe that accepts polygamy was used to determine the beneficiaries. This was because some deceased victims of the Saramakas tribe had practiced polygamy, a practice that was illegal in Suriname. The marriages and births from these unions were not recognized as they had not been registered with the state under Suriname law.[148] In its judgment, the court found that since national law did not apply to the Saramakas, the determination of the beneficiaries would be in accordance with local (tribal) family law.[149] The decision was based on the fact that the Saramakas were not aware of state law and lived by their traditional rules under a treaty granting them permission to be so governed.[150] Furthermore, their customary law was

(1988), para. 174. Another recent decision is *Plan de Sanchez Massacre* (Merits) Judgment of April 29, 2004 Inter. Amer. Ct. H. R. (Ser. C) 105 (2004) paras 96-7 citing inter alia *Case of Tibi*, Judgment of September 7 2004 (Ser. C) 114 para 257.

[145] The other two types of compensation are nominal and pecuniary: D. Shelton *op cit* 292-293, 306-307.

[146] *Trujillo Oroza v. Bolivia* Judgment of February 27, Inter- Amer Ct H R (2002) (Reparations and Costs) Judgement of 27 February 2002, (Ser. C) No. 92 para. 77; *Velasquez-Rodriguez v Honduras*, Compensatory Damages, Judgment Of 21 July 1989, Series C, No. 7 para. 27. Discussed in J. Pasqualucci *op cit* (2003) 264-67 and J. Pasqualucci *op cit* (2006) 318-320 discusses reparations for violations of indigenous peoples rights.

[147] *Aloeboetoe v Suriname* (1994) 15 Inter-Am. Ct. H. R. (Ser. C) Judgement of 10th September 2003 para 19.

[148] *Ibid*, para 61- 63. A detailed discussion of *Aloeboetoe* is in D. Shelton, *op cit* 243-244

[149] *Ibid*, para. 58, 91-93.

[150] *Ibid*, para. 56. Treaty dated 19th September 1762.

recognised by the Suriname Government.[151] All these remedies resonate with African 'traditional' restorative justice because in the process of granting the remedy, the court hears evidence from all sides including the community.

I urge caution, however, in borrowing from IACtHR jurisprudence and give three caveats. Firstly, the situation giving rise to these cases can be distinguished from the legal dilemma in Uganda. Although the ACHR does not address rights of peoples,[152] indigenous systems have legitimacy within the constitutional framework, particularly in Latin America. For example, in *Aloeboetoe* customary law was recognised by treaty in Suriname. This epitomises the trend of constitutional recognition and the grant of specific rights to indigenous peoples in Latin America.[153] As Guzman puts forth, constitutions of Latin American countries have attempted to consolidate the two normative frameworks by recognising traditional systems as legitimate.[154] For example, the 1991 Columbian constitution provides that:

> 'The authorities of the indigenous peoples may exercise judicial functions within their territories according to their own norms and procedures, provided that they are not contrary to the Constitution and the laws of the Republic. The law shall establish the forms of co-ordination of this special jurisdiction with the national judicial system.'[155]

As we have seen in chapters 1 and 4, such legislation is absent from African countries that abolished traditional jurisdiction. The ACHPR therefore will have to deal with the question of non legal recognition of traditional criminal restorative justice systems in some African states.

Secondly, these are civil suits seeking quantifiable damages against the state as the aggressor, not against non state actors like rebel groups or individuals. They are not criminal cases in which the community are seeking to impose sanctions against an individual who has committed offences under traditional clan laws.

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[151] *Ibid*, para 58. Secondly, the state did not provide facilities for registration of the births. This decision is discussed in J. Pasqualucci (2003) *op cit* 269.

[152] J. Pasqualucci *op cit* (2006) argues that it has no equivalent of Articles 20 and 22 in the African Charter that specifically protect peoples' or collective rights.

[153] M. Guzman *op cit* 76.

[154] *Ibid*, 76-77, citing the 1991 Constitution of Columbia (article 246), the 1993 Constitution of Peru (article 149), the 1994 Constitution of Bolivia (article 171), the 1998 Constitution of Ecuador (article 191), the Constitution of Venezuela (article 260), the 2000 Constitution of Paraguay (article 63) and the 1917 Constitution of Mexico as amended in 2001 (article 2.A.II). Four common features emerge. First is recognition of the indigenous peoples as legal entities and their authorities as having judicial functions; second: the authorities may exercise judicial functions within their territories in compliance with their norms and procedures. Thirdly, these norms and procedures should be respected when in compliance with the constitutions and laws in force in the states, and finally the law should establish the method of co-ordination between the special indigenous jurisdictions and the national judicial system.

[155] Article 246 translated *ibid*, 80.

Finally, there are differing opinions with regard to the position of individual rights and rights of 'collective persons'. This is articulated by Judge S. Ramirez in his separate opinion in *Plan de Sanchez Massacre v Guatemala (Reparations)* case.[156] Ramirez maintains that the spiritual aspects of each member of the indigenous community are intricately linked to those of the community. Rights that arise from membership in the community can be exercised, like the right to receive benefits of a culture. In his view, however, each category of collective and individual rights retains their autonomy and entity and although interrelated they are both subject to protection by the court.[157] The ACHPR would likewise need to make a distinction between the two competing interests of individual and communitarian values, then attempt to reconcile them.

To conclude, the jurisprudential worth of the IACtHR's is in attempting to reconcile local norms and practices with international law while protecting the rights of the individual. The IACtHR broad approach enables consideration of wider issues such as whether the victims (including the community) have been deprived of something that only a specific type of restitution can remedy.[158] Such specific restitution could arguably include reconciliation and spiritual rituals.

Section 6: Conclusion

In this Chapter I have argued that although the Charter and its associated Guidelines are meant to give guidance on an African notion of procedural rights, their capacity to do so is limited for several reasons. First, the wording of the Charter on concepts like duties and 'rights of others' is not intended to include communitarian values. Next is the lack of clarity of the scope of traditional courts. The biggest weakness though, is its failure to provide for procedural rights that encompasses duties and communitarian values, while protecting principles of equality and individual autonomy. I also argue that the Commission's decisions do not give much guidance because they are bogged down by an unimaginative application of precedent.

Even if the newly established ACHPR is liberal in its approach, it may not be able

[156] Separate Opinion of Judge S. Ramirez in the Judgement on Reparations in the *Plan de Sanchez Massacre* (November 19 2004) para 2.
[157] *Ibid*, 4-5.
[158] D. Sheldon, *Remedies in International Human Rights Law* (Oxford University Press: Oxford, 1999) 305.

to overcome the hurdle of Article 7 (2) of the Charter that protects the principle of *nulla peona sine lege* to ensure that punishments are provided in written law.[159] Without national laws that recognise traditional clan law, African criminal processes remain outside the ambit of international penal laws and international human rights. It remains a matter of speculation whether the ACHPR will depart from the precedents of the Commission and adopt a more expansive interpretation of Article 60 and 61 to encompass traditional courts operating outside national legal frameworks. The challenge for the ACHPR is to avoid slavishly following European or 'western' practice. Instead, it should critically evaluate Inter American jurisprudence and be innovative about making a case for African normative standards. Ultimately, decisions of the ACHPR ought to guide the ICC on an African concept of procedural fairness. This is imperative because the ICC is obliged to interpret law in a manner that is consistent with 'internationally recognised human rights'.[160] These rights include those in the Charter.

Internationally, some cases raise questions of culturally appropriate procedural justice in sentencing. For example, Ugandan Kony and his rebel commanders- indicted before the ICC are seeking to use traditional justice based on mysticism and reconciliation, for trials for war crimes.[161] Also, the CDF trial before the SCSL depicts the challenge of dealing with *Kamajor* traditions during sentencing.[162] In both scenarios, the dilemma of reconciling communitarian values with Article 14 ICCPR is apparent. Therefore, there is need for relevant African jurisprudence especially on the protection of the right to a fair trial in the sentencing process. What is of equal importance to this thesis is an investigation of how indigenous traditional courts not legally recognised by the state, protect rights of the individual *and* the community. Their experience may give valuable lessons on what approach international courts could adopt in accommodating African concepts of procedural justice. This is discussed in the next chapter.

[159] The Charter *op cit* Article 7(2) whose full text is in S. 2 (i) *op cit*.
[160] Article 21 (3) of the Rome Statute *op cit*.
[161] *Prosecutor v Joseph Kony and 5 others* ICC-02/04-01/05 discussed in Cap 1 S.1 *op cit*.
[162] *Prosecutor v Moinina Fofana and Allieu Kondewa* SCSL-04-14-Tdiscussed in Cap 2 S.5 *op cit*.

CHAPTER SIX: THE JOPADHOLA CLAN COURT SYSTEM: A NORMATIVE PERSPECTIVE

Section 1: Introduction

As we saw in Chapter 5, the African Charter on Human and Peoples' Rights has not clearly defined an African notion of procedural rights. The African Commission on Human and Peoples' Rights likewise, has not translated African values into its decisions in the way the Inter American Court of Human Rights does in relation to indigenous Latin American values. Accordingly, the Charter and the Commission decisions provide insufficient guidance on communitarian values.[1]

How then should one go about integrating the values and structures of what would seem to be distinctively different court systems? This is the crux of the second question examined in this thesis. The first step is in understanding the workings of the clan courts[2] which makes traditional restorative practice more 'visible' at the international level. As Benda-Beckmann argues, when faced with imposition of alien laws on traditional systems, the locals reproduce what they consider to be their normative system in the processes of their decision making ('law out of context').[3] Scant literature exists on the manner in which this reproduction is actually done and the factors that drive it. Most scholarship tends to concentrate on issues where adjudication is governed by customary law under a national legal system.[4]

This thesis is designed to remedy this omission in the literature, as there is no doubt that clan courts merit the same depth of analysis. This is more so because the usual outcome of clan court justice is an imposition of sanctions as a consequence of breaching traditional law. Therefore their procedures should not deprive any party (including the community) of the right to a fair trial. This chapter is intended to illustrate how useful lessons may be drawn from the relationship between national and clan courts in the Ugandan context by providing a case study. I refer throughout the

[1] Communitarian values are duty to kin, reconciliation, restitution and ritual as defined in Ch. 1 S.1 *op cit*.
[2] Clan courts are defined in Ch.1 S.4 *ibid* as kinship adjudicatory bodies.
[3] F. von Benda-Beckmann (1984) *op cit*, 29 discussed in Ch. 3 S. 3 *op cit*.
[4] *Ibid*, 31-32. Academic studies on Uganda's state-managed local council courts are mentioned in Ch. 3 *ibid*.

chapter to the empirical study whose methodology is described in Chapter 1.[5] My analysis is presented through the lens of two clans: Morwa Guma and Jo-Gem, both of the Jopadhola ethnic group.

As far as I am aware, this chapter is the only legal investigation of Jopadhola clan adjudicatory structures. Following this brief introduction, I give a demographic description of the Jopadhola (Section 2) and their genealogy (Section 3). Next is an examination of the metamorphosis of the clan courts following legislative abolition (Section 4). The present clan court set up is discussed in Section 5, followed by a study of Jopadhola criminal law and sanctions (Section 6). I offer a brief conclusion in Section 7.

Section 2: The Jopadhola

In this section, I present the first part of my argument that clan cohesion is important in understanding the clan courts ability to transform their structures without compromising their own normative framework. I start by sketching the demography of the Jopadhola people in terms of population structure, geographical location and the political context in which they operate.

The selection of Jo- Gem and Morwa Guma clans, as I explained in Chapter 1, is because they are a good archetypal sample of how clan courts in 'stateless' societies achieve appropriate sentencing outcomes. The Jo-Gem, a smaller clan, is an example of good practice at a micro level. The practice of the Morwa Guma as an older, better established clan, illustrates translation of 'law out of context' at a more advanced level. Inquiring into these different clan experiences will unearth any similarities and divergence in each clan courts' composition, procedure and in their notion of rights. Such features would be missed if one were to aggregate their practices as being a single approach, as is the case in other studies.[6] Yet these differences and similarities explain in part why traditional experience has not been taken up as a different conceptual model in the international framework.

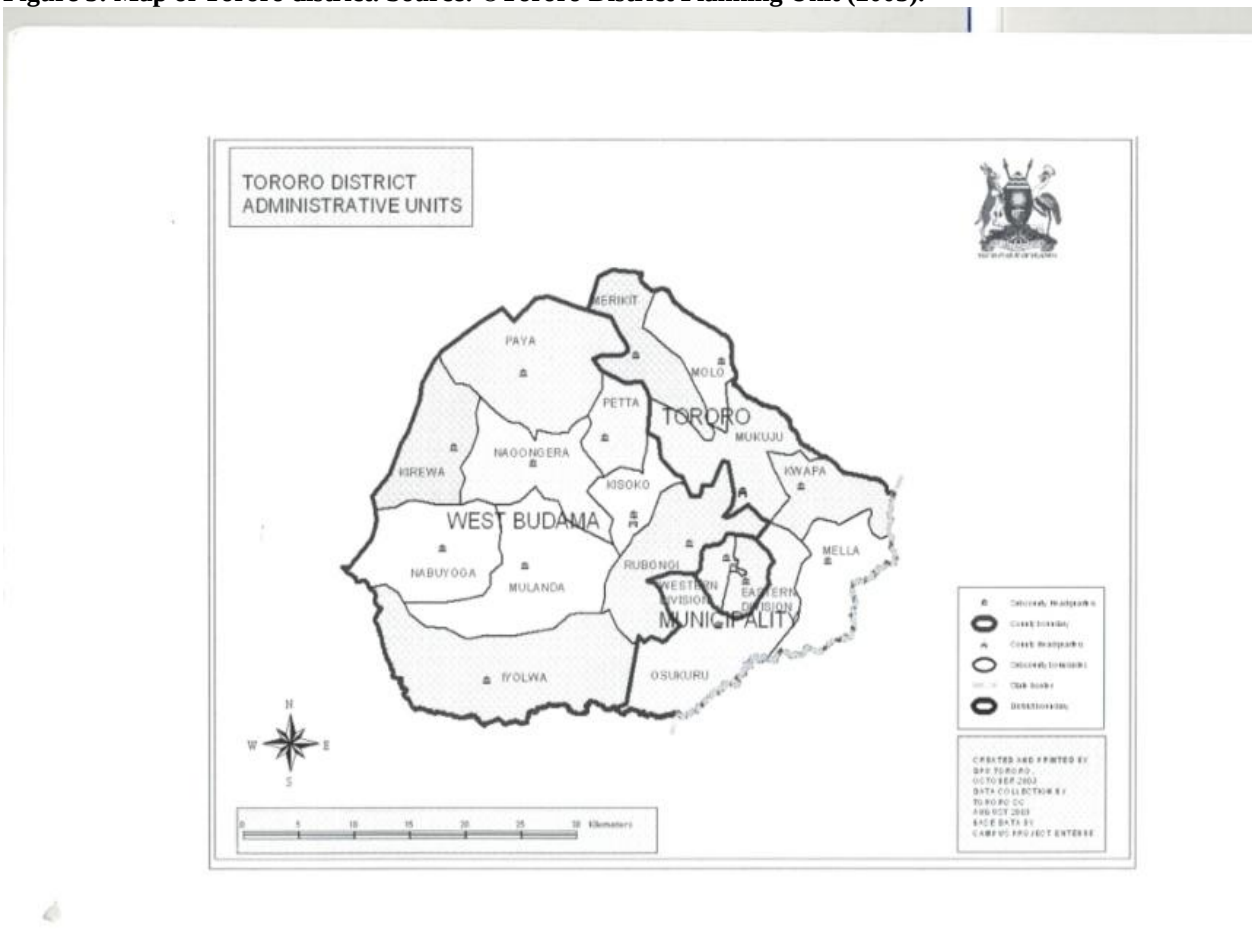
The Jopadhola ethnic group are from the Nilotic linguistic cluster. The language spoken is Dhupadhola which is similar to two other Nilotic languages of Alur and

[5] Ch. 1 S. 6 *op cit* and Appendix 1.
[6] Studies like those on the Gacaca courts, the *Bashigantahe* and to some extent the *Mato Oput* discussed in Chs. 1, 3, and 4 *op cit*, are based on conclusions drawn from aggregate studies.

Kenya Luo.[7] Jopadhola refer to the land they live in as Padhola, which according to renowned historian B. Ogot, is an elliptic form of 'Par Adhola' meaning the 'place of Adhola'. Officially the land of the Jopadhola is called Budama but according to tradition, this is the Kiganda version of 'Widooma' a Jopadhola war cry 'You are in trouble.'[8]

The Jopadhola live mainly in West Budama county, Tororo district in Eastern Uganda on the border with Kenya. Tororo district comprises Tororo county (former East Budama county), West Budama county and Tororo Municipality. The geographical location of West Budama in Tororo district is shown here in Figure 5.

Figure 5: Map of Tororo district. Source: ©Tororo District Planning Unit (2003).



Surrounding the Jopadhola are the Bantu linguistic group, with the Banyole to the North West, the Bagisu to the North East, the Samia to the South and the Basoga to the

[7] B. Ogot (1967) *op cit* 32. Figure 1 is a map showing the distribution of linguistic groups in Uganda. The other Nilotics are the Alur, Acoli, Langi and Kenyan Luo discussed in Ch. 1 S. 6 (i) *op cit*. Singular*: Japadhola*.
[8] *Ibid*, 85. The war cry was against the Baganda who invaded Padhola and were vanquished.

West. The Itesot are the only ethnic group of Nilo Hamitic origin that live with the Jopadhola in Tororo district.[9] This reflects the Jopadhola's resilience and ability to preserve its identity as a Luo island in a 'hostile' sea of Bantu and Nilo Hamitic peoples.[10]

According to the last 2002 census, the Jopadhola are 359,659 of which males are 176,438 and females 183,221, comprising 1.5 % of Uganda's population of 24.4 million.[11] Jopadhola are not considered an ethnic minority group because they are more than 25,000 people.[12] With regards to religion, most Jopadhola are Christians, with Catholics making up 58.7% of the population; Anglicans 30.6% and the rest belonging to other religions. None of the Jopadhola who took part in the census stated their religion as 'Traditional'.[13] In terms of economic development, large proportions (70-80%) of the Jopadhola live below the poverty line.[14] Their activities are mainly subsistence agricultural farming that takes place on land held under customary land tenure. The land is owned by individual families but is allocated and sold to clan members.[15]

The Jopadhola have 52 clans registered with the *Tieng Adhola*.[16] My study focused on two of the clans in Budama North constituency. The Morwa Guma, one of the largest Jopadhola clans, live scattered in all the sub counties and are estimated to number in thousands.[17] For example, the Namwaya Ssaza census of 1996 registered a total of 2,417 adults above 18 years.[18] The Jo-Gem by contrast is a very small clan that was recognised by the *Tieng Adhola* in 2006. They are considered to be '*jo-woko*'- 'those from the outside', because they migrated from Kenya. They live in Kisoko sub-county numbering 396: 44 men, 49 women, 43 women married into Jo-Gem, and 260

[9] The Banyole live in Butaleja district; the Bagisu in Mbale and Bubuulo districts; the Samia in Busia district; the Basoga in Iganga and Bugiri districts and the Itesot live mainly in Tororo County. Appendix 5- Map of Tororo district shows these neighbouring districts.
[10] B. Ogot *op cit* 70.
[11] *The 2002 Population* report, *op cit* Table A12, Chapter 5.
[12] *Ibid*, 24-26.
[13] *Ibid*, Table A14. These include Pentecostal (5.6%), Moslem (2.2%), Seventh Day Adventists (0.5%), Orthodox (0.1%), Others (2.2%) and Traditional (0%).
[14] Uganda Bureau of Statistics and International Livestock Research Institute, *Where are the Poor? Mapping Patterns of Well-Being in Uganda* (Nairobi: Regal Press, Kenya Ltd, 2003), Table 4.11A showing County-level poverty incidence in Eastern Region including West Budama in Tororo district.
[15] Field interview notes of pre-visit meeting with Mr. A. O and Mr. Y.O on 12th August 2006.
[16] *Tieng Adhola* is the cultural union of the Jopadhola. The clans are listed in Appendix III to the 2006 *Tieng Adhola* constitution. A description of the original clans is given by A. Oboth- Ofumbi, *Lwo (Ludama) Uganda: History and Customs of the Jo Padhola* (Nairobi: Eagle Press, 1960) 15-63 and B. Ogot *op cit* Ch 2 and 3, 109.
[17] Pre-visit meeting *op cit*, with Mr. Y. O, Namwaya Saza chief on 12th August 2006.
[18] Namwaya Saza clan members register: August 2006.

youth. The higher figure for youth includes those aged 18 – 25 who are not married.[19] The figures for both clans exclude babies and children.

Figure 6 overleaf, shows the administrative divisions of West Budama County that is divided into two electoral constituencies: North and South. Budama North comprises the sub-counties of Paya, Petta, Nagongera, Kirewa and Kisoko. The study participants were from all the sub counties of Budama North. Budama South comprises the sub-counties of Nabuyoga, Mulanda, Iyolwa and Rubongi. The two clans have followed the old administrative divisions of Kisoko (village), Miluka (Parish), Gombolola (sub-county) and Saza (County)[20] to demarcate the territorial jurisdiction of their courts. These vary within the clan. For example, the Morwa Guma Namwaya Saza court has one of the largest territorial jurisdictions covering Mulanda, Nabuyoga, Pajwenda, Kisoko, Morkiswa and Namwaya; combining present parish and sub-county administrative divisions.[21] The Jo-Gem territorial jurisdiction follows the old administrative divisions up to the Gombolola level.

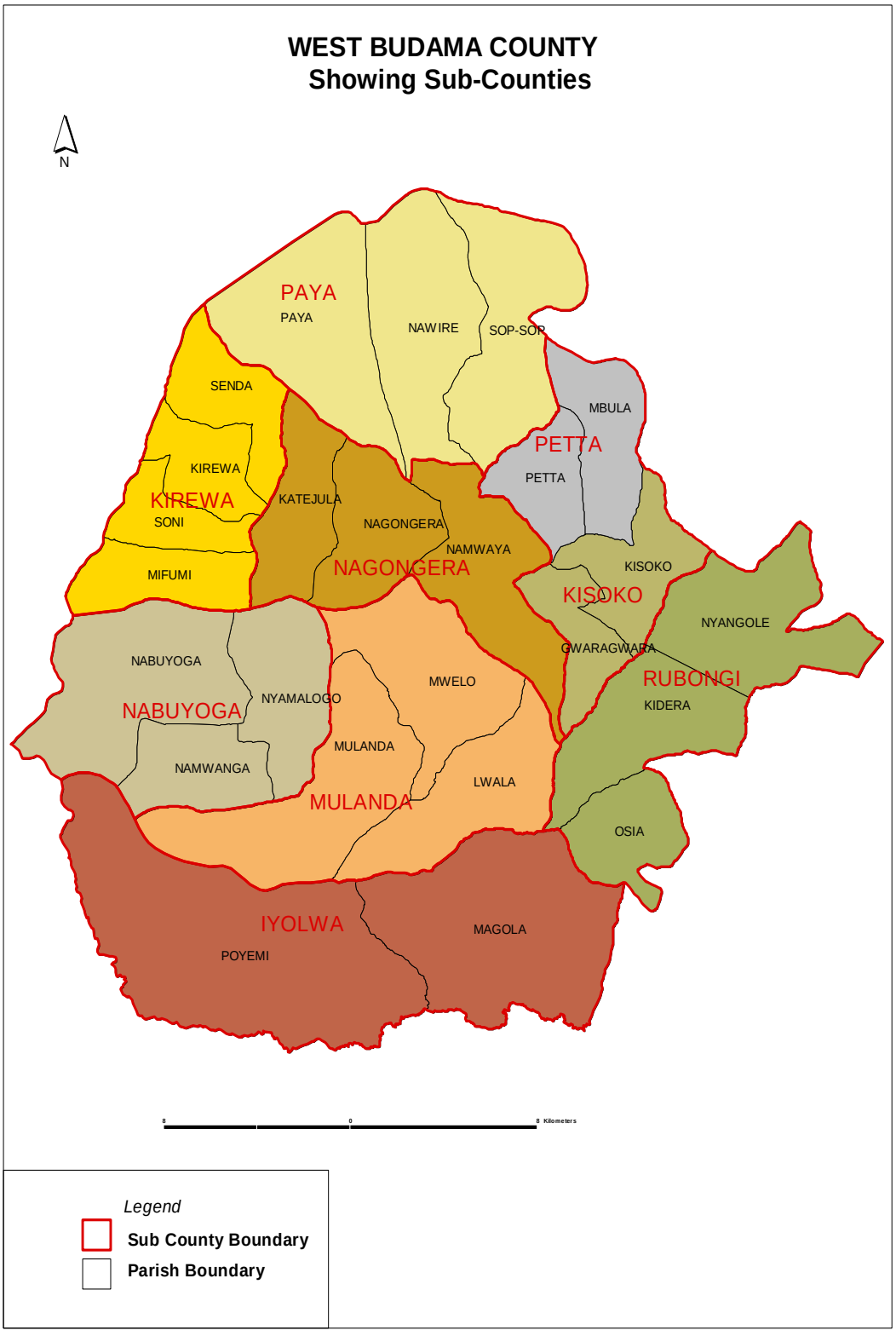
To sum up, the Jopadhola are a community whose social structure is governed very much by the clan. Features like communal land allocation and tenure are but one example of this. This cohesion is also bolstered by their poor economic status where wealth is shared among families. The significance of these characteristics and how they shape court structures becomes more apparent from the genealogy that is discussed in section 3.

Section 3: Historical background: Genealogy of the Jopadhola

In this section, I trace the historical events that led to the formation of the Jopadhola. Through their genealogy, I demonstrate that clan cohesion aided the process of integrating new normative features. The nine original clans assimilated other groups. This led to growth of the clans and brought unity among previously unrelated communities. Features like communal ownership of property and fictional agnation enabled the Jopadhola to assimilate foreign concepts like a common belief in mysticism. Equally, the Jopadhola resisted external pressure to transform their normative standards.

[19] Jo-Gem clan member register: August 2006.
[20] S. 45 (a) Local Governments Act Cap 243 provides for county, parish and village administrative divisions in Uganda. The Jopadhola have applied the present structure while retaining the old colonial divisions of sub-county (Gombolola) and the village (Kisoko).
[21] Pre-visit interview with Mr. Y. O *op cit* on 12/08/06 and interview with Mr. R. O on 16/08/08.

Figure 6: West Budama County showing sub counties & parishes.



Source: ©Department of Mapping and Surveys, Entebbe, 2007.

(i) Luo origins: a study of diversity and assimilation

The genealogy of the Jopadhola is a study of assimilation and resistance. They were part of the Luo groups *circa* 1000 AD who migrated from the Western Nilotic cradle land, west of the Nile in Bahr-el-Ghazal in Sudan, downwards to Western Uganda.[22] *Circa* 1750, the Luo groups migrated from Pawir in Bunyoro-Western Uganda, through Acoli in the north and eventually settled in the present Padhola (West Budama).[23]

The origins of the Jopadhola are the subject of conflicting accounts. Two brothers Adhola and Owiny were probably descendants of Labong'o the son of Olum who lived in Acoli. The brothers migrated from Acoli and moved together to Padhola but parted company under unclear circumstances. One version suggests that the two quarrelled, leading to a split. Owiny then went to Kenya, leaving his brother Adhola in Padhola.[24] Another version is that Adhola had an ulcer on his leg that took a long time to heal. His brother Owiny became impatient and moved on to Kenya leaving Adhola behind to nurse his wound.[25] He was named after this affliction because *Adhola* in the local language refers to an ulcer. Yet a third version is that Adhola's wife Nyajura was so heavy with child that she could not move, so Adhola decided to stay with her till she gave birth. Nyajura's children and those of Adhola's other wife Oryang are the present day Jopadhola.[26] What is not in dispute is that the Jopadhola are descendants of Adhola and that Owiny migrated to Kenya where he later formed the Ja-Luo.

From 1650 to 1700 the first nine original clans moved into present day Padhola that was empty virgin territory. These clans are the Amor, Ramogi, P'Agoya, Biranga, Loli, Nyapolo, J'Ode, Lakwar and Sule. They believed this land was preserved for them by their gods and it was the duty of every person to develop the land and protect it from invasion. This land was a forest (*lul*) so it took a while for it to be tamed. Having done so, land belonged to every person because they had all taken part in improving it 'for the benefit of life'. Any Japadhola could own land anywhere, but an outsider (*ja-wiloka*

[22] B. Ogot *op cit* 41, citing J. P. Crazzolara, *The Lwoo*, Part 1 (Verona, 1950) 31-32 and H. McMichael *A History of the Arabs in the Sudan* Vol.1 (1922) 16.
[23] *Ibid*, 46-47 citing Bere 'An outline of Acoli History' (1947) *Uganda Journal* 1-8, A. Southhall 'Alur Tradition and Its Historical Significance,' *Uganda Journal* (1954) 18, 137-165 and J. P Crazzolara *The Lwoo*, part II (Verona, 1951) 157,174-5.
[24] B. Ogot *op cit* 67-69.
[25] A. Oboth-Ofumbi *op cit* 2.
[26] *Ibid*. Also F. Burke *op cit* 184-185. The Nyapolo clan are descendants of Nyajura's sons.

or *ja-path*) had no rights so could not buy, sell or inherit the land allocated to him.[27] A distinguishing feature of the Jopadhola was their willingness to let non Nilotic groups live with them and absorb them into their clans. They did so by according them 'fictional agnation' (relations through the male line).[28] This led to a growth of clans to the present 54. Some neighbouring groups that were absorbed included the Iteso of Nilo Hamitic origin, and the Banyole, Bagwere, Bagungu, Basoga and Samia, all of Bantu origin.[29] To illustrate how this fictional agnation took place I will use the example of the Morwa Guma and the Jo-Gem clans.

(ii) Origins of the Morwa Guma clan

There are two conflicting versions about the origin of the Morwa Guma. The first is by Ogot who argues that from 1750 to 1800, there was a major invasion by the Iteso into present day Padhola land. The first Iteso families who migrated to Padhola included that of an Etesot called Guma who was adopted by the Jopadhola Sule clan and given fictional agnation. Ogot bases his argument on the fact that Morwa Guma clan have their own *kunu* (shrine) and clan names like Omoroko, Okimat and Atawuti, of Iteso extract, which are signs of long residence and original clan status.[30] Original clans are distinguishable because they possess clan emblems like the sacred spear (*tong*) used for ceremonial purposes like rain making, the sacred drums (*achiel*) and shrine (*kunu*).[31] The Morwa Guma have a *kunu* at Maundo on a hill called *Tawo Jwok*,[32] and possess their own spear, ceremonial staff and sacred drums which reinforces Ogot's claims.

The second version by Oboth-Ofumbi argues that the Morwa Guma clan are descendants of Napakere the son of Nwango alias Morwa, who was a son of Adhola.[33] Napakere had two sons Guma and Sule who settled in Matindi (Nagongera sub-county). According to legend, one day during a party, Guma denied his brother Sule some beef (a taboo in Jopadhola culture) so a disagreement arose. Sule disowned his brother and

[27] B. Ogot *op cit* 87-88.
[28] *Ibid*, 111 citing A. Southall 'Lineage Formation among the Luo' International African Institute Memorandum XXVI (1952) 5-6.
[29] *Ibid*, Ch. 2 and 3, giving details of the origins of these other clans and A. Oboth Ofumbi *op cit* 15-64.
[30] *Ibid*, Ch. 3, 116-117. Another list is given by A. Oboth-Ofumbi *ibid* 45.
[31] B. Ogot *op cit* 79.
[32] A. Oboth- Ofumbi *op cit* 46.
[33] *Ibid*, 44-45.

started his own clan: Morwa Sule.[34] This is one of the worst cases of *Kwero degi* (refusing to eat together) ever known, because it led to a permanent split among siblings.[35] Thus the Morwa Guma was formed.

Nevertheless, the fact that the two clans can intermarry, have clan emblems and clan names of Iteso extract, lends credence to Ogot's assertion that Morwa Guma clan was accorded fictional agnation and later recognised as an original Padhola clan. Notably, during the pre-visit interview and the clan workshop, no reference was made by the study participants from the Morwa Guma clan to their Iteso origin: they insist they are one of the original clans of Padhola.

(iii) Origins of the Jo-Gem clan

The origins of the Jo-Gem clan are not very clear. They appear to be part of the Luo group that migrated through Acoli land to Kenya; for there is evidence to suggest they share some names in common with Acoli clans.[36] The Luo claim to have descended from a deity called *Podho* (fall down) with *Jok* (spirit) as their eponym.[37] Podho's descendants comprise 4 divisions including the Jok-Omolo of which Jo-Gem was a sub group.[38] From Acoli, the Jo-Gem group migrated to Busoga and lived for two generations in Samia. *Circa* 1760 and 1860 they settled in Kenya, eastern Alego on both sides of River Yala, under the leadership of Rading Omolo.[39]

The Jo-Gem ('people of Gem') comprised several sub clans. Among them, political unity was based not entirely on kinship, but rather occupation of particular settled territories (*pinje*). The leader (a sort of chief) of each clan was a *Ruoth*: the jural-political leader of the *pinje* - an influential person.[40] Beyond this there is no historical documentation of the Jo-Gem movement back into Uganda.[41]

The second version of their origin as a splinter group of the Kenyan Jo-Gem is from the Jopadhola Jo-Gem clan themselves.[42] They maintain their leader Owere led them from Yala in Kenya, to Samia (EasternUganda) where they lived for some

[34] *Ibid*.
[35] Field notes of pre-visit interview of 12th August 2006.
[36] B. Ogot *op cit* 61. Examples are the Acoli clans of Bobi, Alero and Pader. *Jo* means 'people of'.
[37] *Ibid,* 143-144. Ogot suggests that *Podho* may have also referred to 'mother earth'.
[38] *Ibid,* 144: the other divisions were Joka-Jok, Jok'Owiny and a smaller group of the Suba, Sakwa, Asembo, Uyomba and Kano.
[39] *Ibid*, 166 -167, 221.
[40] *Ibid*, 170-171.
[41] A. Oboth-Ofumbi, who discusses the Jopadhola clans in great detail, does not mention the Jo-Gem.
[42] Document by the Jo-Gem officials, on file and given to me by Mr. A.O- supreme head of the Jo-Gem.

decades before migrating to Gwaragwara in Kisoko sub-county.[43] Owere married Namuyaga and they had one son: Kiraba. After Owere's death, Kiraba married Achola Nyaparombo and they begot five sons and three daughters. The Jo-Gem clan, descendants of Kiraba, were absorbed possibly under fictional agnation and given the land they own by the Jopadhola Oruwa Pa Demba clan.[44] This claim is supported by the fact unlike the original Padhola clans; the Jo-Gem clan have no sacred spear or drum. However, they have their own *kunu* at Sigulu in the neighbouring Bugiri district.[45] In 1996, Jo-Gem broke away from Oruwa Pa Demba clan because they wished to run their clan independently. They were recognised as a separate clan by the *Tieng Adhola* in 2006.[46]

Despite diverse origins, by the 18th century, the Jopadhola consciousness as a distinct ethnic group had developed because they regarded themselves as the children of Adhola, reducing inter-clan wars.[47] The reason for this unity is also attributed to the belief in mysticism and *Bura* in particular.

(iv)Mysticism among the Jopadhola

Jopadhola traditional belief comprised four entities: family gods, (*Were*) clan shrines (*kuni*), ancestors (*jwogi*) and a religion (*Bura*). At the family level, each home had two gods: *Were ma diodipo* (God of the compound) protected all the people in the home and their wealth. *Were Othin* and his wife *Nyalike* protected family members going out farming, on any journey; and protected the livestock. *Were Othin* had a shrine in each home. In rituals to thank these Gods for good harvests (*misia*), a feast of millet and chicken stew was eaten in each home and the local brew (*kongo*) was drunk.[48]

The shrines (*kuni*) served two purposes. The first was to mark the permanent settlement of the original clans: there were 16 *kuni* throughout Padhola.[49] The second was to provide spiritual guidance to the clan members from a fixed place. The gods of *kuni* speaking through a designated clan leader would reveal what actions needed to be

[43] *Ibid.* Mr. A.O pointed out that it has been wrongly asserted that the Jopadhola Jo-Gem originated from Samia. He stressed that they migrated from Kenya, lived for a while in Samia then migrated to Padhola.
[44] Oruwa Pa Demba are descendants of Demba, son of Oruwa- a son of Adhola: A. Oboth-Ofumbi *op cit* 59-60.
[45] Interview with Mr. A. O on 16th August 2008.
[46] Jo-Gem clan court officials.
[47] B. Ogot *op cit* 104.
[48] A. Oboth-Ofumbi *op cit* 65-69.
[49] B. Ogot *op cit* 88-90.

taken to protect the clan if attacked by enemies. The clan leader then prepared a sacrifice and a meal was shared by the community at the shrine and in the village.[50]

Jwogi were spirits of the dead relatives (ancestors) both young and old, who it was believed would always protect the home from harm.[51] Little huts (*migam*) were built in the homestead for each ancestor. At the end of the year a feast was held in their honour at which local brew *kongo* was drunk and chickens were sacrificed: one for the most senior ancestors- *Jo Dhongo*, the second for other relatives and children.

A new religion of *Bura* is believed to have originated from the Bagwere clans of Jo- Pa- Gembe and Olomole of Bantu origin who settled between 1700 and 1760 in Padhola.[52] These 'outsiders' lived amicably as neighbours before some migrated to the area inhabited by the Jopadhola and were eventually absorbed by them. They seem to have influenced the Jopadhola tremendously in matters of religion. During this time, the Bagwere introduced the *Bura* that eventually became established as a common religion to all Padhola clans. The chief priest and custodian of the *Bura* was a man called Majanga of the Nyapolo clan.[53] Majanga relocated the place of *Bura* from Nyawiyoga to the present day Nyakiriga.[54] Women were not allowed into the Nyakiriga, a tradition which is still followed to date.[55] There within the temple of *Bura* each original clan built its own shrine. Majanga's power of divination derived from his association with the *Bura* and gave him de facto authority over all Jopadhola. He was in charge of purification rituals and used the belief in *Bura* to hold Padhola settlements together.[56]

Although the rituals have undergone transformation and been abandoned by some,[57] belief in mysticism is still deep rooted among the Jopadhola, but to varying degrees. A person may believe in an omnipresent Christian god (*Were*) and simultaneously believe in the protective power of their individual gods (*Were pere*) and

[50] A. Oboth-Ofumbi *op cit* 67.
[51] *Ibid*. Singular: *Jwok*.
[52] B. Ogot *op cit* 107; A. Oboth Ofumbi *op cit* 68-69.
[53] B. Ogot *ibid*, 123- 124.
[54] A. Oboth-Ofumbi *op cit*, at 8; F. Burke *op cit*, 197.
[55] A. Oboth-Ofumbi *ibid* 68. In an interview with Mr. M Owor *Kwar Adhola*, the Jopadhola cultural leader on 15th August 2008, Mr. Owor said he had recently visited the Nyakiriga and observed this. Also a lady M. O, who visited the shrine in 2006, told me she was denied entry because she is a woman: interview on 17th August 2008.
[56] *Ibid* 8-9; F. Burke *op cit* 196-197 and B. Ogot *op cit* 124.
[57] A. Oboth-Ofumbi rightly attributes this change to the coming of Christian missionaries, *ibid* 65. The missionaries branded African religions as pagan and satanic.

the ancestors (*Jwogi*). There is continued use of the *kunu,* belief in *Bura,*[58] as well as a deep rooted fear of evil spirits,[59] all of which contradicts the earlier census figure of 0% belief in traditional religion. The historical background shows why pervasive belief in mysticism feeds into and reinforces customary law and remains an integral part of Jopadhola life as a means of social control. This point is taken up in section 6.

I have argued that historical events shaped the features of the two clans. These features include the assimilation of mysticism; independence of clan units and the collective land tenure system. Still, scant information exists on societal power relations particularly those involving women and children. In due course, there emerged a communitarian framework in which the clan was the central unifying force. This does not mean the clan system was static; it was in fact subjected to external pressure to transform its structures during the colonial and post colonial era. The next section considers the clan's ability to survive this external pressure while adjusting to the structural changes.

Section 4: Metamorphosis of Clan courts

In this section, I develop the second part of my argument. Following the transposition of English criminal law, clan courts responded by adopting those structures they could not resist (or found beneficial) resulting in a metamorphosis of their court structures. I argue that in this metamorphosis, clan courts retained their normative standards, buttressed by communitarian values and a participatory approach - with no single dominant actor. Consequently, national structures had to compete for legitimacy at the local level.

(i) Pre-colonial era

As we saw in Chapter 1, during the pre-colonial era (*circa* 1500-1890) Uganda comprised a diversity of kingdoms, chiefdoms and 'stateless' communities each with their own system of social control.[60] The Jopadhola ethnic group is an example of a 'stateless' community. Their adjudication system was well institutionalised and intra-

[58] Interviews with *Kwar Adhola* (15/08/08); Mr. R. P. O (16/08/08); Mr. A. O (16/08/08) and the discussions at the 1 day workshop on 15th August 2006.
[59] H. O Mogensen, 'The resilience of *Juok*: Confronting suffering in Eastern Uganda' (2002) 72 (3) *Africa: Journal of the International African Institute* 420-436, gives an anthropological analysis of the belief among the Jopadhola in Christianity and illnesses caused by use of evil spirits: also called *jwogi*.
[60] G. Kanyeihamba op *cit* Chapter 1, 1-4.

clan disputes were handled by the clan leaders and elders.[61] This fits the description of an acephalous or segmented society. Though segmented societies lacked centralised control, their social organisation was kin-based in which conflicts and law breaking were resolved using restorative justice. To some, this type of organisation was effective *because* it lacked a single source of overall authority. Therefore conformity with the law meant the leaders had to woo the clan because the members bore little loyalty to the leaders.[62] This was the backbone of the trial process among these segmented groups.

Scant literature exists on the conduct of criminal trials among the Jopadhola. In this regard, Elias's observations about the process of criminal trials depending on the type of society: Group A or B, are very instructive. The Jopadhola fell in Group B type, an 'un-centralised political community' in contrast with Group A that was based on the rule of chiefs or kings.[63] In Group B types, the community fully engaged in deliberations in a seemingly 'casual' manner, particularly in the giving of evidence. Most importantly, 'anyone and everyone who knows about the case would be allowed or encouraged to testify'. At the opening of the case some elders would permit people to speak on the issues in dispute between the parties. This 'elasticity' of the procedure did not degenerate into a free-for-all, but was orderly, following the rigidity of custom. The wide latitude given by the judge or elders was intended to show absolute impartiality during the hearing. The verdict was normally pronounced by the most senior of the elders and based not on theories, but on moral assumptions implicit in norms known to the entire community. The judgements were therefore a 'pragmatic' approach to societal justice of which the adjudicators and other parties were part.[64] Verdicts were arrived at after all adults present had expressed their opinions on the issues freely. Decisions could be deferred until all members of that community were present.[65]

The aim of the traditional criminal justice system was to restore the community to a near equilibrium. Nsereko argues that traditional justice focussed on vindicating the victim and their rights, so the sanction was compensatory rather than punitive. There was no need for imprisonment.[66] Even for the most serious crime of murder, the

[61] Inter clan disputes were arbitrated by leaders of a specified third clan. F. Burke *op cit* 192.
[62] J. M. N Kakooza, 'Uganda's legal history in a nutshell' (1993) cited in E. Beyaraza (2003) *op cit* 112.
[63] T. Elias *op cit:* Chapter XII, 214-215.
[64] *Ibid*, 244-245, 248, 258-259. Discussed in Ch. 2 S. 2 (i) *op cit.*
[65] O. Elechi *op cit* 66 on the right to participate in deliberations.
[66] D. Nsereko (2002) *op cit*, 22-25. The first government prison in Uganda was established in 1903: D. Nsereko (1995) *op cit* para 58 at 36. J. Roscoe, *The Baganda: An account of their native customs and*

punishment was compensatory because the elders regarded the destitute position of the victim's family as more important than the manner of death. To this end, compensation was in accordance with a customary tariff of a graduated scale of compensation or fine.[67] The punishments imposed depended on the gravity of the offence and extenuating circumstances. There was also belief in the healing force of ritual.[68]

The literature on procedural safeguards in traditional societies shows that group rights under *Ubuntu* gave all parties an opportunity to state their case under the equivalent of rules of natural justice.[69] Still, the individual depended on the kinship group who were obliged to assist in protecting these group rights.[70] Elias notes that Group A societies, like the Baganda, had legal representation in their trials and the chief could represent the community in all cases with other communities. By contrast, among Group B societies (like the Jopadhola), the clan controlled and regularised an individual's relationship with his or her kin, and also represented the community in relation to neighbouring communities.[71]

So far, this account appears to present a rosy picture of structures that applied a communitarian notion of equality of arms, permitting all parties to deliberate in proceedings and determination of the verdict and sentence. In this patriarchal setting, however, there is scant evidence of women and children's rights to participate or hold 'judicial' posts in these trials. In the absence of evidence on the Jopadhola, I will rely on accounts of trials in other communities with similar patriarchal heritage.

Driberg's account of the legal status of women, established that Nilotic women were less independent than Nilo-Hamitics because of lesser economic empowerment. Among the Nilo Hamitics, women were allowed to plead in person and even institute proceedings in a traditional tribunal. This was not the case among the Nilotics. There, a male relative or other male would represent the woman. For example, among the Shilluk (Luo of Nilotic origin), a woman could not plead her case but was represented by her husband or chief.[72] This is convincing evidence of women's inferior position in the trial structures.

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beliefs, 2nd Edition (Frank Cass and Co Ltd: London, 1965) at 259, 264-266 gives an account of pre-colonial Buganda where offenders were put in stocks and confined on orders of the King or chief.

[67] T. Elias *op cit* 142, 143.

[68] M. Gluckman, *Politics, Law and Ritual in Tribal Society* (Oxford: Blackwell, 1965) Chapter 6.

[69] Ch. 2 S. 2 (iii) *op cit*, referring to K. M`baye (1975) as cited by R. Mqeke *op cit* at 365.

[70] E. Ankumah *op cit* 160-170.

[71] T. Elias *op cit* 240-242.

[72] J. H Driberg, 'The Status of Women among the Nilotics and Nilo-Hamitics' (1932) 5*Africa: Journal of the International African Institute* 404-421, 419 citing W. Hofmayr.

With regards to the position of children in clan courts there is a dearth of literature. This may be, as Bennet points out, because children's rights were not seen as an issue since children were regarded as a welcome addition to a home and were assured of social welfare. Therefore no formal mechanisms were thought to be needed to protect children.[73] More pertinently, deliberations and decision making was done only by adults.[74] It follows that children had no locus standi in courts. Any cases that touched on their interests were handled on their behalf by a male relative. Clearly they occupied an inferior position like women.

In summary, in pre-colonial times, trial procedures emphasised public deliberations where decisions were arrived at by consensus. However, it is clear that women and children were not on an equal standing because the 'judicial' structures were located in a patriarchal society where male elders controlled the adjudication process.

(ii) Colonial rule: the sub imperialism of Buganda

In this subsection I show how clan institutions survived despite imposition by the colonial administration of foreign structures- Assessors, prosecutor and independent judge, on their adjudication framework. In the process, clan institutions retained their communitarian values within a transformed structure.

Under the 1889 African Order-in-Council, the colonial administration introduced a legal system based on English criminal law. This legislation established a Protectorate in Uganda with jurisdiction in criminal and civil matters over British subjects.[75] Later, the 1902 Order-in-Council introduced the Indian Code of Criminal Procedure (1898) that applied English rules of procedure (Section 15(2)). Lewin describes these rules as so fundamental as to be obligatory on every court of law, because they were based on principles of natural justice: the essence of British justice.[76] The 1902 Order-in-Council also established an administrative framework extending to

[73] T. W Bennet, 'Human Rights and the African Cultural Tradition' (1993) 22 *Transformation* 30-40, 33.
[74] K. Gyekye (1996) *op cit* at 153, O. Elechi *op cit* 66, and Z. Motala, 'Human Rights in Africa: a cultural, ideological and legal examination' (1989) 12 (2) *Hastings International and Comparative Law Review* 373-410, 387.
[75] H. Morris and J. Read (1966) *op cit* 8-19; E. Beyaraza (2003) *op cit* 115-120. Also H.F Morris and J. S Read, *Indirect Rule and the search for Justice: Essays in East African Legal History* (Oxford: Clarendon Press, 1972).
[76] J. Lewin, 'Native Courts and British Justice in Africa' (1944) 14 *Africa: Journal of the International African Institute* 448-453, 450.

the rest of the country. Under Article 20 (1) clan law- referred to as 'native law', was applicable in criminal matters so long as it was 'not repugnant to justice and morality'.[77] In a later enactment, Article 20 of the 1920 Order in Council retained this 'repugnancy' clause on the application of native law. In effect, this created a dual system of law where national courts existed alongside the traditional ones, each with a separate judicial framework. Article 20 has been rightly criticised as an attempt to rid traditional law of procedures that conflicted with English procedural justice.[78]

Initially these laws covered only the Buganda kingdom because it had a pre-existing centralised judicial system. The highest administrators-cum-judges were the district chiefs called *Abamasaza* and their chieftaincies were *Amazasa*.[79] Under Section 2 of the Uganda (Judicial) Agreement 1905, the *Kabaka* (King) of Buganda could constitute native courts in addition to the *Abamasaza* courts to try cases between locals. The *Kabaka's* powers were expanded under the Buganda Courts Ordinance allowing him to prescribe the composition of other courts.[80] This eventually covered all the chiefs operating in the lower councils of saza, gombolola and muluka.[81]

Buganda's judicial structure was later imposed on other parts of Uganda. Some maintain that this was a pragmatic move by the colonial administration because of the apparent lack of chiefly rule in areas[82] like Padhola. However, Mamdani argues convincingly that the scarcity of European administrators made the recognition of existing chieftainship beyond the village level inevitable.[83] In Padhola, Buganda's structure was enforced using a Muganda statesman: Semei Kakungulu, who hoped to become the king (*Kabaka)* of Bukedi.[84] Bukedi was a big province bringing together different ethnic groups: Jopadhola, Bagisu, Banyole, Bagwere, Iteso and Samia. Each group had their own system of governance, so implementing colonial rules through a

[77] J. Oloka-Onyango (2005) *op cit* para 2.2 5-8, gives an overview of the state of customary law during colonialism.
[78] *Ibid* 6-7 citing *Mwenge vs Migadde* H/Ct Misc. case No.19 of 1933 *Uganda Law Reports* 97 that confirmed the repugnancy doctrine.
[79] J. Roscoe *op cit* 233. Singular: *Saza*. The highest appellate court was the *Kabaka's* court for hearing final appeal cases; followed by the Prime Minister's (*Katikiro*) court. The Queen (*Nabagereka*) and King's Mother's courts tried cases among their own servants: 258-268.
[80] S.5 Buganda Courts Ordinance Cap 77 included the power to prescribe the composition of the saza and gombolola courts.
[81] H. Morris and J. Read (1966) *op cit* 29.
[82] *Ibid*, 39.
[83] M. Mamdani *op cit* 85.
[84] A. D Roberts, 'The Sub Imperialism of the Baganda' (1962) 3 (3) *Journal of African History* 435-450, 435 argues that the Buganda Kingdom was able to perpetuate its own imperialist objectives through the rest of the British protectorate later called Uganda, under the guise of participation in expanding the British influence.

unified customary structure and law was impracticable (unlike in Buganda with its centralised system).[85] Kakungulu ruthlessly imposed the Buganda chieftaincy and administrative hierarchy by subdividing Bukedi into twenty *saza* based on the pattern of Buganda. Therefore when the British assumed authority, they applied indirect rule but twice removed.[86]

The chief imposed by the state had legislative and judicial powers to preside over the clan courts.[87] This changed the decision making process from intra-clan arbitration to that of a chief imposed by the colonial administration. This structure was legalised in the Native Courts Ordinance that provided for the establishment of native courts in the Protectorate outside Buganda. Native courts could apply native law and custom provided it was not repugnant to natural justice or morality.[88] They could also apply native customary practice and procedure.[89]

The Jopadhola had to cope with two things: first the administrative changes at the unit level and secondly, the imposed judicial structures. With regards to the administrative changes, the clan leader was now elected at the funeral of his predecessor unlike the past where it was hereditary. Additionally, though each clan segment had its own leader, collectively the whole hierarchy of leaders adopted the official administrative system.[90] However, this organisation of Budama along administrative units of pecho (village), miluka (parishes), gombolola (sub-county) and saza (county) came only after Majanga's defeat by Kakungulu's forces in 1901.[91] Kakungulu then tried to reorganise the existing social structure of Bukedi, but the Jopadhola clans fiercely resisted (unlike their neighbours) and the attempt was abandoned.[92] This is because the Jopadhola lacked any central authority but were held together by a tribal consciousness: the worship of *Bura* and an emphasis on responsibility to the clan.[93] Through using survey methods, Southall and Burke established that Jopadhola clan colonies were independent politically of their original

[85] *Ibid*, 440. Tororo district was formerly Bukedi district whose administrative set up is discussed in detail by F. Burke *op cit* 178-180. Tororo district was carved from Bukedi in 1980.
[86] *Ibid*, 204.
[87] M. Mamdani, *op cit* 119. The fastest way to create a market economy he argues was to give the chief consolidated powers of judge, legislator and executive.
[88] S. 11 Native Courts Act (1941) Cap 76. The Act was preceded by the Native Courts (1940) Cap 40 and the Courts Ordinance (1911) that replaced the Native Courts Ordinance 1909.
[89] Native Courts Act, S. 18 Cap 40 (1950).
[90] F. Burke *op cit* 187-188 193.
[91] *Ibid*, 197- 198.
[92] A. Roberts *op cit* 442, citing an interview with B. Ogot.
[93] This was in contrast to the other tribes who surrounded them: F. Burke *op cit* 196.

settlements although they may have regarded them and their leaders as seniors. The more localised clan segments were autonomous and retained exogamy, so even where the clan was living in different parts of Padhola they acted as one unit.[94] Evidently the Jopadhola were unaccustomed to the system of chief hierarchy and exhibited strong anti-authority and anti-chief attitudes towards Kakungulu. The resistance reached its tipping point with massive riots in the early 1960s.[95]

With regards to the judicial structure, there were two major changes. One was the introduction of the Buganda centralised system in which a chief (judge) had powers to try cases and determine sentence.[96] The second was the introduction of assessors to help the court arrive at a decision. A third change, on which there is inconclusive evidence, was the introduction of the prosecutor.

In the case of the judge, the Jopadhola adjudicatory system, as we have seen, had no place for a dominant court official, only elders who pronounced the decision after public deliberations. The only change noted during this period is that the Jopadhola in isolated instances left the power of determining guilt to be exercised by one individual.[97] However, there is no evidence to suggest this was a widespread practice, particularly since the clan courts could apply customary practice and procedure under the existing laws.[98] On the contrary, the newly re-constituted state courts like the saza and gombolola courts could not exact public coercion in the form of sanctions, because remedial sanctions depended more on the relationship between parties than universal explicit laws.[99]

Assessors were introduced in the Indian Criminal Procedure Code of 1898. Their use started with the Courts Ordinance (1909), by District courts and the High Court, in civil cases involving natives.[100] This was extended to criminal cases by the Native Courts Act 1941, giving the option for courts to sit with the help of assessors appointed by the Senior Courts Advisor.[101] Apart from assisting the court to arrive at a decision, there were no other specified powers for the assessors. Following the repeal of the Native Courts Act by the African Courts Act 1957, the Chief Justice controlled the

[94] *Ibid*,188. Exogamy is the custom of marrying outside the tribe, clan or other social unit.
[95] *Ibid,* 219. K. Benne and A. Loveridge, *Report of the Commission of Inquiry into disturbances in the Eastern province 1960,* on the riots because of local discontent with the chiefs and their operations.
[96] J. Roscoe *op cit* 241.
[97] F. Burke *op cit* 218.
[98] Native Courts Act, Cap 40 *op cit* S. 18.
[99] F. Burke *op cit* 236.
[100] Courts Ordinance Cap. 4 (1909), S. 51 and 52.
[101] S. 4 (1), Native Courts Act Cap 40 came into force on the 2nd June 1941.

composition of the District African Courts set up at sub-counties.[102] The courts could sit with the aid of two assessors whose opinions were not binding on the presiding official.[103]

District African courts, whose officials were appointed by the colonial administration, were now moving away from the flexibility in the delivery of justice that was facilitated when all parties (litigants, assessors and judge) were personally acquainted.[104] By now the scope of native law- renamed customary law, was simultaneously being whittled down. The sentences passed by the District African Courts were by law, limited to imprisonment, corporal punishment, fines, forfeiture or compensation in cash (Section 16). This attempt at legal centrism[105] robbed clan courts of the jurisdiction to apply restorative justice within their context.

The Jopadhola fought to protect their diminishing jurisdiction. Clan courts continued to operate because they still wielded authority over crimes like witchcraft, warfare and criminal violence.[106] Although they adopted structures like assessors, clan courts continued to use a participatory approach in decision making. The outcome was the operation of clan courts 'conjoined' with the District African courts. Most Jopadhola believed kinship organisation was everyday government responsible for sanctioning certain behaviour and prohibiting others. They did not differentiate between the official government system and the clan courts.

The official chiefs found that they had to rely on the authority of the clan leaders to do their work. To indulge them, the official chiefs would sometimes imprison individuals handed over to them by the clan leaders. This led the people to believe that clan courts possessed the power of official imprisonment which was a contradiction given that clan courts traditionally had no powers of imprisonment. They only took advantage of the available state penalty. Failure to comply with the order of the clan court could result in litigation in a formal court, although the decision of the clan court was rarely overturned.[107] In addition, each clan court protected communitarian values

[102] African Courts Act, Cap 38 (1957), S. 37.
[103] *Ibid*, S. 4(1), 4A (1) and (2) (f).
[104] F. Burke *op cit* 66: established in a study carried out in Padhola.
[105] J. Oloka Onyango *op cit* 7 citing J. Okumu Wengi, *Women's Law and Grass roots justice in Uganda: Essays in Women's' law* (Kampala: Uganda Law Watch, 1997) 1.
[106] F. Burke, *op cit* 189,193.
[107] *Ibid*, 189.

like restitution, by exacting compensatory tariffs in the form of money and cattle. Compensation was the responsibility of the individual's kin.[108]

The Morwa Guma clan assert that the position of prosecutor existed since the 1960s and was probably present in pre colonial times.[109] There is, nonetheless, little evidence to confirm the latter aspect of this claim. I suggest that this structure was *assimilated* in the 1960s but not before. That said, the Jopadhola probably used it in much the same way as they did the Assessors and judge: integrating the prosecutor in a participatory process of adjudication.

This discussion shows how the state manipulated traditional justice to keep it abreast with 'westernised justice' as part of modernisation. As Oloka-Onyango puts it concisely, the emerging customary law was suited to retaining social cohesion, law and order, and economic production, rather than promotion of individual equity and rights.[110] The cost was a weakening of traditional normative standards. In spite of this, clan courts were able to sidestep the legislative changes by retaining their normative structures for resolving social problems. So strong was their influence that national courts even integrated some of their structures and procedures, during the post independence period.

(iii) Post independence

The post independence government sounded the death knell to the clan courts at a constitutional and statutory level. Firstly, the 1962 Independence constitution provided that offenders could only be convicted for offences defined and penalties prescribed in written law.[111] Secondly, the Magistrates Courts Act created a single hierarchy of courts with powers to administer customary law in their areas of jurisdiction[112] in so far as customary law was not 'repugnant to natural justice, equity and good conscience'.[113] Lastly, the District African courts ceased to operate.[114] As Oloka-Onyango concludes, both constitutional and statutory developments meant that

[108] *Ibid*, 215-219.
[109] Mr. Y. O, pre-visit interview, *op cit*.
[110] J. Oloka-Onyango *op cit* 7-8.
[111] Article 24 (8) 1962 Independence Constitution introduced the principle of legality of *nullum crimen nullum poena sine lege*.
[112] S. 3 and S.9 (1) Magistrates Courts Act (MCA), Cap 36 Laws of Uganda (1964).
[113] *Ibid*, S. 15(1) (a).
[114] *Ibid*, S. 35. S. 38(2) also abolished courts set up under the Buganda Courts Ordinance and the Native Courts Act *op cit*.

the state had taken over the adjudication of criminal matters irrespective of whether or not they had a customary element.[115] This effectively transferred the adjudication of clan criminal law from clan leaders to formal courts.

Legislative abolition did not end the role of clan courts. They continued to operate filling in the gap left in the adjudication of clan criminal law. Their significance re-emerged, when in 1987 the National Resistance Movement government established Resistance Committee Councils replacing the previous local administrative units. These councils that also had women and youth representation[116] were later granted judicial powers because magistrates' courts were allegedly corrupt. The resistance committee courts (later renamed 'local council courts') also had legislative and executive powers.[117]

As Barya and Oloka-Onyango argue, local council courts were only created to provide a *semblance* of a traditional approach to judicial power. In fact, the courts were based on the model that was transplanted from the popular justice models of Mozambique, and elsewhere.[118] To this end, some structural features were borrowed from traditional courts but with modifications. For instance, the Local Council Courts Act (2006) prohibits legal representation (like in clan courts), but simultaneously enjoins local council courts to apply principles of natural justice.[119] Additionally, there are no provisions on communitarian participatory 'rights', or rituals for reconciliation, restitution and purification.

These legal developments are significant because they show yet another attempt at standardisation of customary process,[120] but the evidence strongly suggests that this may not be feasible. Take the example of a survey on user perceptions of local council courts in Tororo district (including Kisoko sub-county within the study area) in 2005.[121]

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[115] J. Oloka-Onyango, *op cit* para 3.1 on the effect of S. 9 (1) MCA *ibid*.

[116] Resistance Councils and Committees Statute: No.8/ 1987. S.2 established councils at village, parish, sub-county, county and district level. S. 10 (1) (d)-(e) provided for (among others) women and youth representatives. A background to the local council courts is in Appendix 10.

[117] B. J Odoki, 'Reducing delay in the administration of justice: the case of Uganda' (1994) 5 (1) *Criminal Law Forum* 57-89, 64. Judicial powers were conferred under the Resistance Committees (Judicial Powers) Statute 1/1988. Ch. 1 S. 5 *op cit* discusses the jurisdiction of the present local council courts.

[118] J. Barya and Oloka-Onyango *op cit* at 46. In Cap 3 of their study, they discuss the development of popular justice tribunals and demonstrate how the model failed to take account of normative structures in the local communities.

[119] The Local Council Courts Act *op cit* (LCC Act) S. 16 (2) prohibits legal representation except in proceedings on infringement of a by-law; and under Regulation 23 (2) Local Council Courts Regulations 2007 in proceedings involving a child. Rules of natural justice in S. 24 are discussed in S. 5 (i) *infra*.

[120] J. Barya and J. Oloka-Onyango *op cit* 49- 56; 64 discussing lack of procedural justice in these courts.

[121] Nordic Consulting Group (2006) survey *op cit*.

The survey established that a 'working relationship' exists between the clan leaders and local council courts, and there is a pervasive influence of customs in decision making.[122] This finding illustrates the ability of clan leaders to influence the decision making processes in national court systems.

In sum, the belief that the centralised Buganda model of social control could be imposed on a society that lacked a central authority, proved to be too optimistic. The Jopadhola adopted some of the structures, but retained their processes that allowed for debate and checking of any abuse of power by court officials. Therefore government legislation did little to change the fundamental characteristics of public participation, accountability and collective decision making. Let us now explore the extent to which the present clan court set up accommodates distinct features of national structures.

Section 5: The present clan court framework

In this section, the third part of my argument analyses the clan courts set-up to establish the extent to which national procedural structures[123]are 'borrowed'. I illustrate how on the one hand, assimilation of national structures has not whittled down the participatory approach and communitarian values, thus indicating the resilient nature of traditional clan law. On the other hand, the assimilation process highlights the ability of the clan courts to reproduce national structures and adapt them to suit their values. I conclude that the transfer of national structures has not distorted the normative framework of the clan courts. Rather, it has enriched their composition with, among others, wider representation and quasi judicial oversight.

(i) The Jo-Gem courts

The Jopadhola word for court: '*koti*' is from the English word 'court'. Study participants explained that a *koti* hears cases affecting only clan members, who all have a stake in decision making. The Jo-Gem clan have three clan courts as illustrated in Figure 7.

[122] *Ibid*, Part 9.

[123] The assimilated structures are: Assessors; Local Council 1 chairman; women and youth representatives; the prosecutor and judge.

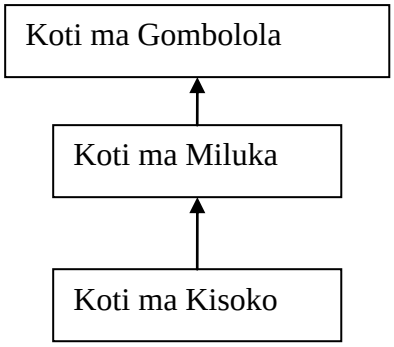


Figure 7: Jo-Gem clan court set up

The highest court is the Gombolola court. Lower down is the Miluka court, then the Kisoko court. Each clan court has unlimited original and local territorial 'jurisdiction' over all criminal matters in the clan. The only exception is the Kisoko court that lacks the jurisdiction to hear a matter where the offender pleads not guilty. In such a case, the matter is automatically referred to the Miluka court. The courts all have the same composition:

> 'Each court has four people: the chairman and three helpers. All the courts have at least one woman in each court. This started in 1986 with the Movement Government. Each court has the Local Council 1 chairman sitting as a government official. The three officials are called "Ja Kony pa chairman" meaning "helper of the chairman" but also called an *Assessor*, a title borrowed from the courts of law. They may ask questions and cross examine witnesses together with the chairman. The Local Council chairman may also ask questions: that is his role.'[124]

The English word 'chairman' is sometimes used interchangeably with *Woni Komi* literally 'the owner of the chair' and refers here to a clan head who sits as the ex officio chair of the clan court. The 'helpers' or *Jo-Kony*, (called Assessors), give advice on clan law and participate in decision making. Each court has a secretary *(Ja-Kalani*) to take minutes.

Two structural transformations can be discerned. The first is the adaptation of Assessor as a 'helper' to the court and the second is the inclusion of the chairman of the Local Council 1. In the magistrates' courts, the role of Assessors is to advise the lay magistrate on customary law in civil proceedings,[125] while in the High Court, assessors give advice on issues relating to criminal trials though not necessarily of a customary

[124] Written document prepared by Jo-Gem leaders, presented by Mr. A. O at the pre-visit interview *op cit*. The same response was given by the rest of the Jo-Gem participants in the workshop.
[125] MCA *op cit*, Third Schedule: Civil Procedure Rules for courts presided over by Magistrates Grade II- Rule 26 (1) in respect of customary marriage, recovery of dowry and custody of children.

law nature.[126] Assessors (Magistrates' courts and the High Court) take an oath to impartially advise to their best knowledge, skill and ability on the issues before the court.[127] For trials in the High court, assessors are pre-selected for appointment from a list prepared by the Chief Magistrate. Only those who are proficient in English - the language of court -are selected so that they can follow proceedings.[128] In the Magistrates courts, assessors are selected by the Chief magistrate in consultation with government sub county chiefs.[129] By contrast, the assessors in the clan courts are selected by adult suffrage: they must be proficient in the local language and need not have formal education. Among the study participants, for instance, it emerged that all the assessors were semi-literate farmers while all the secretaries were teachers.[130]

In the Magistrates' courts and the High Court, assessors may ask questions for clarification. Still, assessors do not participate actively in the deliberations although they do give a non binding opinion to the judge.[131] By contrast, as the quote above shows, the *Jo-Kony* (Assessors) are elders whose role, apart from examination of witnesses, is to determine the moral culpability of the offender, give advice on the sentence and rituals in accordance with clan law.[132] Clearly their role bears little resemblance to their non clan-court counterparts.

The role of the Local Council 1 chairman was described as follows:

> 'The clan call a representative of government like the Local Council 1 Chairman, the clan chair of the area then they sit during that time to hear the case. The Local Council Chairman helps the clan to ensure that they decide the case *without breaking the law of the government*.'[133]

This excerpt points to quasi- governmental oversight during clan court decision making, through the appointment of the Local Council chairman. At first glance the chairman's role in the clan court does not seem to be much different from the official one performed ordinarily. The Local Council 1 chairman is head of the lowest government administrative unit and functions as the political head of the council.[134] The chairman sits *ex officio* as part of the executive committee and chairs the local council

[126] TIA *op cit* under S. 3(1) there can be two or more assessors but in practice only two sit in a trial. Under S. 68, assessors may give advice to the court.
[127] *Ibid*, S. 67 TIA and Rule 26 (6) MCA *op cit.*
[128] Assessors Rules in the Schedule to the TIA*:* Rule 2(1).
[129] *Ibid*, Rule 1. Also MCA *op cit* Rule 26(4).
[130] Attendance sheets for the clan workshop. Details are in Appendix 3-List of study participants.
[131] MCA *op cit* Rule 28 (2) and TIA *op cit* S. 82 (2).
[132] Kisoko, Miluka and Gombolola Jo-Gem court groups. The title *Jamich rieko* (the giver of knowledge) is used interchangeably.
[133] Gombolola Jo-Gem group. Emphasis is mine.
[134] Local Governments Act Cap 243, S.50

court.[135] Other committee members include women and youth representatives (who also sit on the local council court) and participate in the deliberation of court cases.[136] Theoretically, the chairman is very well placed to enforce government laws and protect procedural rights, because local council courts must apply principles of natural justice during the trial.[137]

All appointments are done by the supreme governing body of the clan called *Nono* which endorses decisions of the -whole clan (*Jo Nono*). No campaigns are permitted as one must demonstrate the ability to serve the community selflessly. As Jo-Gem leader Mr. A. O put it concisely: "You cannot simply *want* this job."[138] The elections, though not held at regular intervals, are based on adult suffrage. The Jo-Gem clan do not have specific posts for youth, but they ensure that all courts have a woman representative. Reason being: "The government laws do not permit women to be denied representation in anything nowadays".[139]

To summarise, we can see that structures adapted from the national courts have been assimilated, but only insofar as they fit within participatory process and communitarian values. I now turn to the Morwa Guma courts.

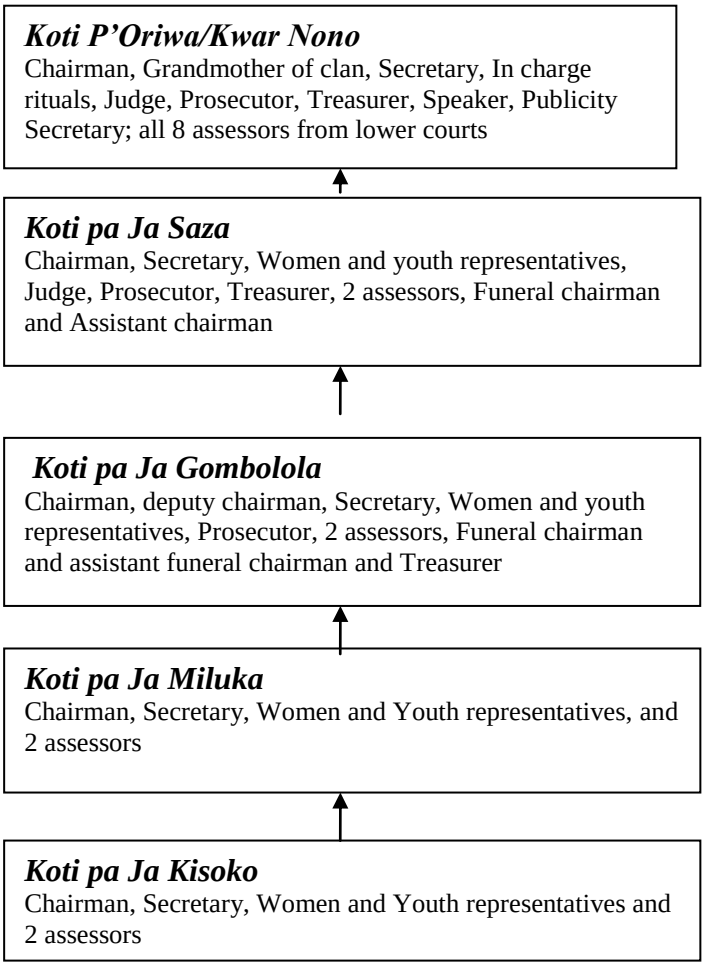
(ii) The Morwa Guma courts

Morwa Guma has a different set of structures to Jo-Gem clan. Figure 8 overleaf, depicts the lower *Kisoko* and *Miluka* courts; both presided over by a clan head (*Ja Kisoko* and *Ja Miluka*).[140] Other members are: a Secretary (*Ja Kalani*), a women representative, youth representative *(Soye*) and two helpers or Assessors.

The Morwa Guma higher courts comprise a *Gombolola* court is presided over by the clan head: *Ja Gombolola*. Others include: deputy chairman (*Ja kony pere*), secretary, women and youth representatives, funeral chairman (*Ja Kika or Jadwong Ywaki*)[141] and assistant (*Ja kony pere*), treasurer (*Ja Kani*) and a prosecutor (*Ja kiosa*).

[135] LCC Act *op cit* S.4.
[136] *Ibid* S.4 and Local Governments Act *op cit* S. 47.
[137] LCC Act *ibid* S. 24 (a)-(d): The principles permit each party: an opportunity to be heard; to be given notice of the proceedings and the case against them; to call witnesses and adduce evidence in support of his or her case. Also any member of the court with an interest of whatever nature is disqualified from hearing the case. This matter is taken up in Chapter 7 *infra*.
[138] Pre-visit interview *op cit*. Emphasis added.
[139] *Ibid*.
[140] For instance, *Koti pa Ja Kisoko* literally means the court of the chairman of the Kisoko clan unit.
[141] The role of the funeral chairman is to collect bereavement money from clan members to help with funeral expenses of a deceased clan member.

Figure 8: Morwa Guma clan court set up



Higher up is the Saza court (*Koti pa Ja Saza*) chaired by the *Ja Saza*. Although there is no deputy chair, there is a secretary, women and youth representatives, funeral chair and assistant, treasurer and prosecutor. The Saza court also has a judge *(Ja thumi banja*) who presides over court sessions.

The highest court is the P`Oriwa[142] chaired by the supreme clan elder (*Kwar nono*)- also the custodian of the Morwa Guma ceremonial staff. Other members include the Grandmother of the clan (*Adha nono*), judge, prosecutor, secretary, treasurer, all assessors from the lower courts, the speaker (*Ja Luwo*), publicity secretary *(Ja Kowi wachi)* and a person in charge of rituals *(Ja Chowiroki*). The latter's job is to ensure that purification or reconciliation rituals are performed properly. This composition reflects a conflation of executive and judicial functions where a clan leader can equally preside over court cases as the judge, while other members represent their

[142] It may also be called the court of the *Kwar Nono* (Grandfather of the clan). The term is used interchangeably with *P`Oriwa*.

constituents.[143] The Morwa Guma constitution likewise provides for the judge as a position in leadership, but not as a separate judicial entity.[144]

Three structural transformations are evident here: representation of women and youth; and the inclusion of a judge and prosecutor in the higher courts. Unlike the Jo-Gem, there is no ex officio post for the Local Council chairman. Local council officials participate in decision making like any other clan member.

The Morwa Guma clan have positions for women and youth in all the clan courts. Youth positions are excluded only from the final appellate court of P`Oriwa. Women and Youth representation is a recent development in this patriarchal society, one that is aimed to ensure equality of representation in clan courts, previously lacking. According to the respondents, women and youth representation was adopted in 1992 because of the government's emphasis on equal representation in all forms of governance.[145] Whether this is translated in real terms will be explored in the next chapter.

The judge and prosecutor go through a different appointment process from their counterparts in the national courts of law. Firstly, as I have stated above, all appointments to the clan court are through adult suffrage and based on meritocracy. The constitution provides that: 'leaders who rule the clan must be people who are good clans' [sic] people'. However, what makes a 'good' clan member is not defined.[146] Elections by adult suffrage are held by the governing body (*Nono*) every 5 years with no term limits. The last elections were held in June 2007.[147] Canvassing and campaigns are permitted, but personal attributes like: "The contribution of the individual to the community, their ability and behaviour,"[148] count more. This is similar to appointment criteria of the Jo-Gem. This contrasts with national courts where selection, nomination and appointment are based on an individual's legal qualifications and experience,[149] not

[143] Mr. Y.O, at the pre-visit interview *op cit*. This was confirmed by Morwa Guma members in the clan workshop and in an interview with Mr. R Odongo on 16/08/08.
[144] Constitution of the Morwa Guma clan (24th August 1985, edition), Chapter 13 (34)(vii).
[145] Pre-visit interview, with Mr. Y.O *op cit*.
[146] Morwa Guma constitution *op cit* Chapter 11.
[147] *Ibid*, Chapter 11 S. 31. Elections are held at all the clan units of Kisoko, Miluka, Gombolola, Saza and Kwar Nono: interview with R. Odongo *op cit*.
[148] Pre-visit interview, *op cit,* with Mr. Y. O.
[149] Appointment criteria is spelt out in Article 143 (1) (c) (d) and (e) of the Uganda constitution *op cit*. For the High Court and Court of Appeal, appointees should be advocates of a minimum 10 years standing. For the Supreme Court, one must be an advocate of 15 years standing. For both the Supreme Court and the Court of Appeal, the appointee may alternatively have served as a Judge of the High Court, or be a distinguished jurist (for Court of Appeal). An advocate is a person qualified to practice law and entered on the Roll of Advocates under S.1 and S.8 of the Advocates Act Cap 267.

contributions made to the community and certainly not by adult suffrage. The appointment of Magistrates and Judges is by the Judicial Service Commission.[150] Judges are nominated by the Commission, vetted by the Parliamentary Legal Committee and appointed by the President.[151] The judiciary is also subject to executive oversight of the Ministry of Justice.[152] Secondly, youth (aged 18+) may be appointed to the clan court. By contrast, in the judiciary, youth in their late teens, early twenties or thereabouts, cannot be appointed to serve as judicial officers on a superior court.

With regard to the role of the judge, there is a stark difference. In the clan court, the judge has no powers of judicial oversight but only chairs the court proceedings and does not make unilateral decisions in sentencing. Even where the judge has powers to come to a verdict, for instance in the P`Oriwa court, this is subject to deliberation by *Jo piny* (the people). By contrast in the court of law, a judge or magistrate makes a unilateral verdict and decides on sentence.[153] Both verdict and sentencing decision is not open to public deliberation.

The prosecutor in the Morwa Guma court is appointed by adult suffrage based on meritocracy. Conversely, the appointment of the national Director of Public Prosecutions is not by adult suffrage nor is it based on contribution to the community. The nomination is by the Public Service Commission; the nominee is vetted by Parliament, and appointed by the President.[154] The Director heads the Directorate of Public Prosecutions (DPP) made up of state attorneys (qualified advocates) assisted by lay prosecutors. All staff perform under delegated powers.[155] The staff are selected and appointed by the Public Service.

Under the Directorate of Public Prosecution Policy, a prosecutor does not involve the community as a party to the prosecution.[156] Rather, the Policy provides safeguards for the protection of the victim (and offender) while representing society's

[150] S. 5 Judicial Service Act (Cap 14) refers to the constitution Article 147 (3) *ibid* on the appointment of judges and Article 148 for appointment of other judicial officers (including magistrates).
[151] *Ibid*, Article 142.
[152] N. Bazaara fittingly points out that control over finances and general decisions regarding the welfare of judicial officers is a mechanism used by the executive to erode independence of the judiciary: 'Mixed results in Uganda's Constitutional Development: An assessment of the year 1999' in K. Kibwana, C. Maina and N. Bazaara (eds.) *Constitutionalism in East Africa: Progress, Challenges and Prospects in 1999* (Fountain Publishers: Kampala, 2001) *op cit*, 19-20.
[153] S. 133 MCA and S. 82 TIA *op cit.* The mode of adjudication is also discussed in Ch.1 S.5 (iii) *op cit*.
[154] Uganda constitution *op cit* Article 120 (1).
[155] *Ibid*, Article 120 (4) except for discontinuance of cases. Details of the district offices are available on their website at http://www. dpp.go.ug.
[156] Interview with Assistant Directors of Public Prosecutions (Commissioners) on 22/08/06. The Prosecution Policy 2002 is on the file with the author.

interests.[157] To the contrary, in Morwa Guma clan courts, the prosecutor only presents an opening statement and announces the witnesses to the court. The prosecutor does not present the case on behalf of society, represent the victims' interests, or cross examine the defendant. This is done collectively by *jo piny* (locals).[158]

Like the Jo-Gem, the role of the Assessors (*Jo-Kony*) is to give advice on punishments under clan law, rituals to be followed and the effects of non compliance. This ability of clan courts to retain their normative framework arises from the type of policy making bodies that exist within the clans.

(iii) The *Nono*

The lack of uniformity in the structures of clan courts demonstrates their independence. Each clan has a supreme governing body called *Nono* comprising the leaders of all clan units. All adult clan members are collectively called *Jo-Nono*. This type of traditional government is described by some as government by discussion and consent, because it does whatever possible to ensure cohesion of the group. Its legal proceedings are a community affair aimed at reconciling parties.[159]

The findings support the literature. The study participants explained that *Nono* is a policy making body that passes regulations for coherence of the clan. *Nono* has more executive and judicial, than legislative functions. Their role is executed by facilitating discussion, arriving at a consensus on all issues and ultimately submitting to the decision of the majority clan members.[160] The *Nono* organise elections of court office bearers, clan heads and other officials;[161] decide the amount of court fees and funeral dues; oversee allocation of land; organise funerals and register clan members. Voting at all clan gatherings and elections is organised by *Nono*. The study participants explained that though they were part of *Nono*; they lacked the jurisdiction to make or change penal laws, procedures and rituals, as clan law is fixed and rarely changes. Within this context, the setting up of the *Tieng Adhola* as an overarching body raises interesting issues.

[157] *Ibid*. This is standard practice.
[158] My observations in the trial simulation on the 15th August 2006 and field notes from the groups *op cit*.
[159] A. J. G. M Sanders, 'Comparative Law and law Reform in Africa, with special reference to the law of criminal justice' in P. Takirambudde (ed.) (1981) *op cit* 150-151.
[160] Field notes of plenary discussion in clan court workshop.
[161] Morwa Guma constitution *op cit* S. 31 even provides for an electoral committee to handle elections.

(iv) The role of *Tieng Adhola*

Despite individual clan autonomy, the establishment of the cultural union – *Tieng Adhola* ('lots of people') – as a body corporate in 1992; was an attempt to unify the clans under one umbrella body.[162] After an interim leadership for 2 years, in September 1998, elections took place at which *Kwar Adhola*: the head of all the clan leaders was elected.[163] The *Kwar Adhola* is recognised nationally as the cultural leader of the Jopadhola.[164] This unity was not without contention. The Nyapolo clan have in the past contended that such an institution circumscribed clan autonomy, and in any case as descendants of Majanga they were the rightful heads of this union.[165] The Nyapolo refused to recognise the union, but later recanted.[166]

There is little evidence that *Tieng Adhola* has sufficient social legitimacy to influence the structures of clan courts due to its lack of historical ties to the clan. For example, one of the functions of the union is to 'advise and settle all disputes of a cultural nature' and set up institutions to effect this.[167] In this respect, a legal department was established, but it seems to have little power to give legal advice to clan courts on their jurisdiction. The legal department instead handles land disputes and minor criminal matters, acting as a quasi-review body whose mandate appears to interfere with the independence of the clan courts. Subsequently, this renders the *Tieng Adhola* ineffective in ensuring that there are procedural safeguards in clan courts trial process. There are plans, however, to try to foster closer ties with all clan heads to discuss legal issues.[168]

To conclude, the process of translating legal structures into clan courts has been a deliberate one. The structures absorbed were selectively reproduced to suit the traditional functions of clan court as decision makers, preserve a communitarian approach to adjudication and retain local methods of resolving of social problems. These social problems are defined under Jopadhola clan law, replete with punishments.

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[162] The *Tieng Adhola* was registered in 1995. Interview with the *Kwar Adhola* also called *Kwar Nono*- Mr. M. Owor on 17th August 2006.
[163] *Kwar Adhola* is established under Article 9.05 of the Constitution of *Tieng Adhola* (2006). A copy of the constitution given by Mr. M. Owor is in my file.
[164] The *Kwar Adhola* is also entitled to all benefits listed in Article 246 constitution *op cit*. Interview with Mr. M. Owor conducted on 15th August 2008.
[165] F. Burke *op cit* 196 suggests that before the arrival of the British, the Jopadhola were moving towards a centralised system where the Nyapolo clan led by Majanga had pre-eminence among the rest.
[166] Interview with Mr. M. Owor on 15th August 2008.
[167] Constitution of Tieng Adhola *op cit*, Article 6.05.
[168] Interview with Mr. M. Owor on 17/08/06 *op cit*.

Section 6: Overview of Jopadhola criminal law and punishments

I give a brief background in this section, to Jopadhola criminal laws and sentences as a tool of social control. The law combines transplanted penalties as well as traditional ones. In this respect, Jopadhola substantive law represents Nabudere's 'New traditionalism' where African customary law was socially engineered by colonialists and has survived.[169]

(i) Jopadhola criminal laws

We saw in Chapter 3 that scholars like Drumbl discount traditional punishment schemes because they are seen as prone to manipulation or arbitrary application. Yet local practices are arguably vital to the process of reconstruction of social norms, and to avoid 'externalisation of justice'.[170] Moreover, traditional clan law is not altogether irrelevant, because under Article 126(1) of Uganda's constitution, local norms and values must be applied by national courts in arriving at their decisions. Jopadhola law has survived social engineering by reproducing some state punishments into their own context while retaining traditional ones. National laws have also reproduced aspects of clan penal law, yet little is known about precisely *what* aspects have been adopted. An overview of the contemporary laws of the Jopadhola will demonstrate my point.

The nature of Jo-Gem law is oral laws. Conversely, the Morwa Guma's written constitution provides for some crimes, taboos, and penalties- *Matemwa*.[171] In both clans, there is no distinction between civil and criminal matters: a characteristic of segmented societies that remains unchanged from pre-colonial times.[172] This characteristic may be attributed to the restorative inclinations of the clan, for both civil and criminal matters, which made such a distinction largely pointless. There was no need for a penal code or procedural rules setting a burden of proof. The law was not debated or legislated upon, but was derived from custom that was in turn related to the supernatural.[173] Deviation from community values was viewed as a sin against the supernatural force of law, so supernatural devices were used as a means of social

[169] D. Nabudere (2002) *op cit* 4, referred to in Ch. 1 S. 4, *op cit.*
[170] M. Drumbl *op cit* referred to in Ch. 3 S. 3 *op cit*.
[171] Morwa Guma constitution *op cit:* Chapter 7 on Incest and Chapter 8 on murder.
[172] L. P Shaidi, 'Traditional, colonial and present day administration of criminal justice' in T. Mwene-Mushanga (ed.) (2002) *op cit* 2 and T. Elias discussed in Ch. 2 S. 2 *op cit*.
[173] F. Burke *op cit* 242.

control to ensure conformity within the traditional sector.[174] Rituals are an example of supernatural devices that were reinforced by belief in ancestors and gods.

Some writers suggest that traditional African communities categorise crimes either as 'ordinary' or 'anti-social'.[175] Responses from the study participants, show that Jopadhola law comprises ordinary crimes, anti social crimes and a host of taboos; all tempered with mystical beliefs. So in practice, the two categories of crime are not strictly distinguished. Ordinary crimes like murder, theft, sexual assaults and assault, have no supernatural causes because it is deemed that the individual had *mens rea* to carry out the *actus reus*.

Anti-social crimes, like witchcraft are considered grave firstly because of its use of magic. Secondly, the use of such supernatural powers brings misfortune to the entire clan or neighbourhood. Ekirikubinza notes that legislation was first passed in 1957 recognising witchcraft as an anti-social crime. Since then Uganda's superior courts have taken judicial notice of people's fears and belief that misfortune is caused by witchcraft.[176] In *Attorney General v Salvatorio Abuki* the offence of witchcraft as defined in Sections 2, 3 and 6 of the Witchcraft Act, was interpreted by the Supreme Court to be the 'exercise of supernatural powers by a person in league with the devil or evil spirits'.[177] Though the appellant, Abuki did not challenge his conviction on witchcraft, Judge A. Oder found that under the Witchcraft Act, punishing persons practising witchcraft was a 'laudable objective'.[178] Ultimately, both the legislature and the courts have adopted traditional standards of social control to gain social legitimacy.

Taboos, as Beyaraza explains, are comparable to crimes attracting punishment in positive law, where norms of the do's and don'ts are clearly prescribed.[179] Examples of taboos among the Jopadhola are: incest, (*nywomo wat*) beating a daughter-in-law; abusing parents, son or daughter-in-law (*yeti manya ori*); lying down on the bed of a

[174] *Ibid*, 64-65.
[175] H. Driberg (1932) *op cit* and L. Shaidi *op cit*. I adopt Driberg's definition of anti-social crimes as those crimes that cannot be dealt with by normal methods because of the illegitimate use of magic and supernatural powers as discussed in Ch. 2 S.3 *op cit*.
[176] L. T Ekirikubinza, *Women's Violent Crime in Uganda*: *More sinned against than sinning* (Kampala: Fountain Publishers, 1999) 191-195. She also gives an analysis of witchcraft as a motive and defence.
[177] *Attorney General v Salvatorio Abuki* Supreme Court Constitutional Appeal 1 of 1998, per Wambuzi C.J, Lead Judgement of 25th May 1999 at 263, citing the Witchcraft Act Cap 108 (1964 Edition) now Cap 124 (2000 Edition).
[178] *Ibid*, at 289-290.
[179] E. Beyaraza, *Contemporary Relativism with Special Reference to Culture and Africa* (Makerere University Printers: Kampala, 2004) 165, persuasively argues that these taboos were to maintain respect and decency within communities. Taboos were also intended to train people to gain spiritual and moral adulthood: P. Ikuenobe *op cit* 32-33.

child by the parents, or on a parent's or in-law's bed by a married person; and refusing to share a meal because of a bitter quarrel between two people (*kwero degi*).[180] These taboos are based on mystical beliefs intended to instil morals and respect in the community. Consequently, breaching taboos particularly in familial or marital relationships is believed to bring bad luck (*lusiwa*).

Incest, for example, is defined under traditional clan law as having sexual relations with someone from the same clan.[181] The actual meaning of *nywomo wat* is 'marrying a relative'. This definition is wider than the prohibited degrees of kinship set out in the offence of incest in the state's Penal Code,[182] because it includes *all* members of the same clan. Clan members are regarded as close as blood relatives. To the Jopadhola, such relationships are believed to bring extreme bad luck (*lusiwa*) to the individuals, their family and their clan, unless the offenders are purified. The rationale for the taboo against such relationships is to prevent hereditary diseases from being passed on through inbreeding, but this is buttressed with mystical beliefs.[183] This traditional definition of incest was affirmed in 2006 in *Kiwuwa v Serunkuma and Namazzi*.[184] There, the High Court declared that an intending marriage in the Church of Uganda, between two people from the same clan (*Ndiga*) of Buganda, was null and void under Buganda customary law.[185] This shows that national law (albeit relating to marriage) has reproduced elements of traditional law so as to compete for local legitimacy.

In sum, Jopadhola criminal laws are socially constructed to maintain family and clan cohesion, by stressing deference towards one another. In some ways the punishments reflect this social control.

[180] Pre-visit interview, group and plenary discussions *op cit*.
[181] Morwa Guma constitution *op cit* Ch. 7 para 17 proscribes sexual relationship among clan members.
[182] Under S. 149 (1) Penal Code *op cit*, incest is a sexual relationship between parents, siblings, children and in-laws.
[183] E. Beyaraza *op cit* 165-166 discusses a similar taboo among the Bakiga of Western Uganda, and suggests that taboos also reflect a desire to maintain group unity.
[184] *Bruno L. Kiwuwa v Ivan Serunkuma & Juliet Namazzi*, High Court civil suit No. 52 of 2006.
[185] *Ibid*, per Kasule J, at page 35. This decision is in respect of customary marriages that are legally recognised under the Customary Marriages (Registration) Act Cap 248.

(ii) Punishments under Jopadhola laws

Most literature refers to traditional punishments being restorative in nature, largely compensatory with fixed tariffs, fines, and an obligatory reconciliation feast to conclude the sentencing process.[186] The Jopadhola are no different. Sentences under Jopadhola law for taboos and ordinary crimes are largely compensatory with fixed tariffs. Likewise, requirements for reconciliation rituals are fixed and none may be changed, not even by *Nono*.

The Morwa Guma constitution for example, provides that offenders will be given a suitable punishment like paying money, a cow, a sheep, a chicken, whipping, or payment of other items in the specified colours (*pieso*).'[187] Take the case of marrying a relative (incest). The punishment for comprises a fixed tariff of one cow (*dhiang luk*), a sheep, one white and one red cockerel and local beer payable by the father of the male offender to the woman's family. Apart from the cow, the rest of the items are given to the maternal nephew (*Okewo*) who performs the purification ritual.[188] For beating of a spouse, the offender pays cash compensation and takes an oath (*kwongiroki*) never to do it again. If a tooth is broken, the offender must pay for it. In short, punishments are clearly prescribed under traditional clan law.

Some punishments like imprisonment and whipping (*chwado powo*), however, reveal the retributive element of traditional law. Both punishments as we discussed earlier, were assimilated by the Jopadhola following their imposition during Kakungulu's rule under the colonial administration.[189]

With regards to imprisonment, the Morwa Guma constitution provides that whoever breaks the law may suffer 'imprisonment at the hands of the government' (Chapter 15: Paragraph 36). Study participants explained that imprisonment may occur when the clan court convict a person of witchcraft, or where an offender fails to honour

[186] The restorative philosophy is discussed in Ch. 2 s. 3(iii) *op cit*. The definition of a fine in a communitarian sense is regarded as a compensation to both the victim (and their family) and as we shall see, sometimes to the community.
[187] Morwa Guma constitution *op cit* Chapter 9 para 23. *Pieso* are used in purification rituals.
[188] *Ibid*, para 17. Also stated by the clan groups and in the plenary discussion. .
[189] Under S. 16 African Courts Act *op cit.*

the sentence agreements made before the court.[190] Although imprisonment may seem an appropriate alternative sentence in such circumstances, it shows that clan courts can manipulate the system thereby inflicting punishments unknown to traditional clan law. As we saw in section 4 above, imprisonment is a relic from the colonial era when local government courts imprisoned offenders sent to them by the clan courts. However, it was difficult to ascertain the frequency with which this imprisonment was taking place.

Whipping (Corporal punishment) is another punishment retained from colonial legislation.[191] According to the study participants, whipping is administered to instil respect among the youth for clan court decisions, as a punishment for theft and for removing bad luck.[192] In the trial simulation, for example, two adult Morwa Guma offenders, Ms. N and Mr. O, pleaded guilty to living together for a year. They were convicted on their pleas of marrying a relative (incest) and sentenced. The man in charge of rituals (*Ja-Chowiroki*) outlined the purification process that follows:

> 'The *Okewo* will build a grass hut (*kayindi)* and the couple will strip naked, leave their clothes in the hut, and remain in the hut with a dog. The hut is set alight and they all run out naked where *Okewo* will be waiting to whip them. As they run out the *lusiwa* is removed and they are cleansed.'

The act of whipping (and stripping naked) underpins the punitive philosophy of the purification process, even when aimed at removing bad luck from the perpetrators-ostensibly to protect the clan.[193]

To conclude, I have shown how Jopadhola laws retain restorative underpinnings, but may manipulate the state's penal system to take advantage of existing retributive punishments like imprisonment. Equally, the state has recognised traditional anti social crimes like witchcraft in its legislation and judicial decisions. Even so, some Jopadhola sanctions and purification rituals are in violation of substantive international human rights. The outcome is a 'melded' structure with a potential for protecting some individual rights, while maintaining a parochial approach to communitarian values. I take up this point in the next chapter.

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[190] Saza and P`Oriwa Morwa Guma groups. Study participants cited refusal to pay the fines or taking their time to pay them as reasons for imprisonment. A. Skelton and M. Sekhoyane fear that under restorative justice, victims may not achieve the right to a punitive remedy if the offender refuses to honour the agreement: *op cit* 582. The Jopadhola appear to have found a 'legal' solution to this problem.

[191] S. 16 African Courts Act *op cit*.

[192] Mr. C. O an elder in Jo-Gem and the Saza Morwa Guma group.

[193] This is similar to rituals among the Mende in Sierra Leone, where offenders found guilty of theft are subjected to treatment that may be qualified as torture Ch. 4 S. 5 (i) *op cit*. Retributive philosophy in sentencing is discussed in Ch. 2 *op cit*.

Section 7: Conclusion

I have shown in this chapter how clan courts have adopted features of national courts, while maintaining local legitimacy and social control without compromising on their normative standards. This innovative approach seems more integrative than that pursued by national and international tribunals. For example, gender and age representation within the clan courts are non-traditional features. Their integration has done much to blunt the critique that customary justice often turns out, on inspection, to be patriarchal justice. Yet this is no procedural accident. The historical evolution of clan courts reveals clan cohesion and adaptation to survive, which explains the creation of a semi-regulatory framework and quasi-governmental oversight. This is tempered by mysticism and communitarian values.

The re-constituted structure is a result of a democratic process of participation developed within a framework that may protect the right to a fair trial during sentencing. The clan court structure has metamorphosed over the centuries through the pre-colonial to colonial and post colonial times. Despite these changes, the supreme governing body of each clan: the *Nono*, has no mandate to direct the lower clan courts to develop a procedural structural framework. Therefore each clan unit has their own unique structures. The *Tieng Adhola* appears to be equally ineffective in promoting a translation of structures from national to clan courts, perhaps due to weak grass-roots support. The state has even passed legislation that adopts traditional crimes. This is evidence of the robustness of the non centralised system.

This chapter provides insights into the nature of adaptations that international law may have to follow if it is to have local legitimacy. Most important is the question how these 'reproduced' structures can act as a mechanism of accountability in a strict legal sense, by protecting procedural guarantees. Against this backdrop, the next chapter examines how the clan courts grapple with interpreting the right to a fair trial during the sentencing process without distorting their traditional normative standards.

CHAPTER SEVEN: TRANSLATING PROCEDURAL RIGHTS IN JOPADHOLA CLAN COURTS

Section 1: Introduction

Previously we saw that the Jopadhola have assimilated national court structures into traditional ones,[1] without compromising on their normative standards. The issue which this chapter addresses is how Jopadhola clan courts use this 'integrated' procedural model to harness similarities and blend divergent normative standards. Other African studies have examined the practice of traditional courts, mostly in post- conflict societies, but have not gone into great detail on the protection of procedural rights during sentencing.[2]

Skelton and Sekhonyane maintain that restorative justice processes that are less closely linked to the criminal justice system, may find informal ways of ensuring human rights protection.[3] I support their view. This chapter is intended to illustrate the 'informal ways' in which clan courts protect individual procedural rights in a communitarian setting. I refer throughout to the findings from my empirical study and clan court transcripts.[4] I argue that clan courts apply an expanded notion of rights that includes individual autonomy and equality, abridged by social obligations. Lack of a prescriptive framework from the *Nono* (governing body), *Tieng Adhola* (cultural union) and higher traditional courts, nonetheless leaves interpretation of rights to the vagaries of individual clan courts that apply traditional 'precedent'. This interpretation process is dependent upon a participatory approach, influenced somewhat by the rules of natural justice adopted from local council courts, with which clan courts are familiar. Either way, the protection of communitarian values is

[1] The national structures assimilated are: Assessors, judge, prosecutor, women and youth representatives and the Local Council chairman of zone 1 (hereafter 'Local Council 1 Chairman') - Ch 6 *op cit.*

[2] Contemporary studies exist like *Roco Wati I Acoli op cit*, a study of clan courts in Acoli, and Hovel and Quinn's précis of procedural rights in Acoli customary law; both discussed in Ch. 3 S. 2 *op cit*. There is *The Law People See op cit* on communities in Sierra Leone discussed in Ch. 4 S.5 *op cit*. Other studies focus on traditional courts operating under national law in accordance with prescribed procedural rules and procedural rights: K. Apuuli, Unpublished Thesis (2006) *op cit*; B. Tshehla (2005) *op cit* and F. Kayitare, *Respect of the right to a fair trial in indigenous African Criminal justice systems: the case of Rwanda and South Africa* Unpublished LLM thesis (University of Ghana, 2004) studying Gacaca courts and the South African Chief's Courts.

[3] A. Skelton and M. Sekhonyane *op cit* at 593.

[4] The detailed methodology is in Appendix One and Ch.1 S. 6 *op cit.*

underscored.[5] I conclude that clan court practices offer salutary lessons on making sentencing outcomes fair and culturally relevant.

To the best of my knowledge, this chapter is the only empirical work on the protection of procedural rights within Jopadhola sentencing processes. Following this brief introduction, my arguments are presented in 5 sections. First, I give an overview of the traditional notion of procedural rights (Section 2). Next is a discussion of legal tensions arising from its application and attempts by clan courts to reconcile divergence and harness similarities (Section 3). I then consider why traditional institutions have failed to formulate a prescriptive procedural rights framework (Section 4). The use of precedent is discussed in Section 5. Finally, I offer a brief conclusion (Section 6).

Section 2: Protecting due process rights in 'stateless societies'

Skelton and Sekhonyane rightly observe that there is broad agreement that rights should be protected within the restorative system.[6] In this section, I investigate the protection of procedural rights within the Jopadhola non-state justice system. Specifically, I show how a traditional notion of participatory rights protects the individual and community jointly as rights holders and party to a criminal case.

(i) Jopadhola definition of procedural rights

In this analysis, I adopt the legal position that traditional courts are enjoined under the Guidelines to the African Charter on Human and Peoples' rights (hereafter African Charter') to adhere to principles of fair trial.[7] Traditional courts under Section S (1) include clan courts. Clan courts therefore interpret or 'translate' legal norms. Their interpretation of individual autonomy and equality produces a specific procedural language[8] that influences the application of procedural rights. The issue then, is what the Jopadhola procedural language of rights is. This point is of

[5] Communitarian values namely the duty of kin; reconciliation, restitution and role of ritual are defined in Ch.1 S.4 and Ch. 2 S.2 *op cit.*

[6] A. Skelton and M. Sekhonyane *op cit*, 588.

[7] Section Q (a) of the *Principles and Guidelines on the right to a Fair Trial and Legal Assistance in Africa* (hereafter 'the Guidelines') enjoin traditional courts to respect international standards on the right to a fair trial, and expound Article 7 of the African Charter: discussed in Ch. 5 S. 3 *op cit*.

[8] M. Langer *op cit* 9-11, argues that legal terms may have different meaning in a different procedural language or structure of interpretation. I suggest that clan courts give different meaning to legal terms within their procedural language.

importance because as Baderin rightly observes, it may be ambitious to expect traditional courts to apply international rights standards when they are not subject to formal rules of evidence and procedure.[9] Still, as my study shows, Jopadhola clan courts have been able to apply to apply human rights standards in the absence of written procedural rules, thus circumnavigating such points of conflict.

Linguist S. Byakutaga explains that local languages do not have a 'one-to-one correspondence in lexica semantic aspects,'[10] rendering words like 'law', 'rule' and 'regulation' difficult to translate into Ugandan languages. The equivalent for all three words is 'law'.[11] Similarly, in the Jopadhola language there is no difference in meaning between these three words: 'Law,' 'Rules' and 'Human Rights'. They are all '*Chik*': a law. A suffix: *ma* (belonging to) or *pa* (theirs) defines *whose* laws or rights. For example state laws are *chik ma gavumenti* and human rights are *Chik ma yiko kwo pa ji jie*: 'laws that protect the lives of all people'.[12] The use of the word *jie* denotes 'everybody' as contrasted with *dhano*-a person, or *ani*: 'Me'. This reflects a communitarian nature of autonomy which, according to Ikuenobe, connotes a moderate sense of individual sovereignty that avoids extreme autonomy or lack of it.[13]

The Jopadhola meaning of rights is more in line with the definitions of Gyekye and Cobbah although it draws somewhat on a convergence with the notion of individual rights as a claim to something. Cobbah maintains that entitlements and obligations form the basis of the kinship system. As Gyeke puts forth, communitarian values do not go against the ethic of individual rights, but the latter may be abridged by social responsibilities in so far as is necessary to maintain the integrity and stability of the group.[14] The Morwa Guma constitution for instance, sets out social responsibilities (duties) like observance of rituals,[15] but there is no provision on the protection of *individual* interests. In fact the word 'right' is a misnomer, for in Dhupadhola, this translates as: '*oyeyi go'* –'one is allowed to do or obtain something', meaning a person *may* have a claim to something. Still, as Ikuenobe would put it, an

[9] Guidelines *op cit* S. Q (1), M. Baderin *op cit* 126 discussed in Ch. S. 3 (iii) (b) *op cit*.
[10] S. Byakutaga 'The need to demystify legal language in Uganda,' in P. G Okoth, M. Muranga and E. O Ogwang (eds.) *Uganda: A Century of Existence* (Kampala: Fountain Publishers, 1995) 132.
[11] *Ibid.*
[12] Gombolola Jo-Gem: 'The laws of the clan and that of the government both protect people's lives.'
[13] P. Ikuenobe *op cit* 40-41.
[14] K. Gyekye (1997) *op cit* 65-66. J. Cobbah *op cit* at 320-321. See discussion in Ch. 1 and 3 *op cit*.
[15] Morwa Guma constitution *op cit* Ch. 9 para 22 on performing rituals and visiting shrines. Other responsibilities include payment of funeral dues under Ch. 3 para 7 and on payment of dowry in Ch. 6.

individual cannot regard such claim as an absolute entitlement as defined in international procedural rights.[16]

Individuality is however reflected in the notion of 'parties' to a case. Thus, study participants defined the victim as *ngata owumiya* - 'the *one* who has been hurt' and the complainant as: *ja kiosa*: 'the *one* who has reported'. The prosecutor-also *ja kiosa*, reports the case to the court. The defendant is *Ja banja* 'the *one* who has a problem', or *won banja*, the *owner* of the problem'. The judge is *won kom* 'the owner of the chair'. The pre-fix '*Ja*' and '*Won*' are singular and refer to the individual attributes of the conflict. Plural is '*Jo*': 'people'. 'Parties' include the victim, defendant and community (*Jo piny*). Collectively, all have a broader role than in international courts, for they have participatory 'rights' at all stages of the trial, including the deliberation of sentence.[17] To understand the ways in which participatory 'rights' are translated into the communitarian system, I start with an investigation of how prosecutorial and judicial functions are exercised communally.

(ii) A participatory approach to sentencing

We saw previously (Chapters 2, 3, 4 and 6) that at the structural level, the participatory approach competes with the judge controlled approach. This is exemplified in the functions of key actors in Jopadhola sentencing process that bear a communal meaning in relation to power structure. The shared procedural function of key actors puts all parties on an equal footing. Every person may participate in giving and examination of evidence and adjudication. This portrays informality of procedure and public participation, characteristic of traditional restorative justice discussed in previous chapters. Excerpts from the trial simulation on incest between members of the same clan, illustrates my point:

ASSESSOR 1: Madam, what is your Clan?

Ms.N (accused): I don't know.

PROSECUTOR: Let us then call the father of the girl to give evidence on her clan.

(Father of the girl is fetched by the Askari-court official)

JUDGE: Thank you for coming. Could you please tell us who these two people are?

[16] A definition of international procedural rights as absolute entitlements by C. Safferling *op cit* and H. Friman *op cit* (2004) is given in Ch. 1 S. 4 *op cit*.

[17] In terms of Bassiouni's distinction between parties and participants to a conflict (2006 *op cit*) discussed in Ch. 2 S. 3 (v) *op cit*, the Jopadhola notion of rights makes the victim, offender and community, all parties to the conflict with substantive participative rights.

FATHER OF GIRL: They are my father, daughter and brother.

ASSESOR 2: Please don't confuse us. We need to know the exact relationship.

FATHER OF THE GIRL: It is true he is my brother.

COMMUNITY (IN CHOROUS): He is lying. That is his son-in-law and he lives with his daughter.

JUDGE: Is there any witness to this?

MS O: Yes, I live next to them and they have lived together for more than a year now. You can even ask the other village mates.

The excerpt shows how a participatory approach differs from the judge controlled approach in the international model. Traditional proceedings have no separate structured sentencing hearing. Rather, the judge is actively assisted by the assessors and the community during the trial. Evidently, the assessors are more active in examining of witnesses than the prosecutor. Further, the community may comment on the veracity of evidence because the judge is more like a chairman, permitting interjections from any one. By giving every person *locus standi in judicio*, the judge is perceived as being absolute impartial during the hearing.[18]

There are other differences in approach that are striking. Firstly, there are no secret deliberations in light of the open nature of proceedings. Study participants emphasised that the parties and the community must be fully involved in deliberation of sentence: a task left to judges in international trials. The parties or their kin, participants argued, must be free to support either party and even negotiate the sentence on their behalf. Secondly, in using the participatory approach, the courts apply principles of group rights and reconciliation, akin to social fairness.[19] Social fairness provides accountability, commands public confidence and is achieved by having every adult engage in independent fact finding and adjudication. Participants explained the process of arriving at the sentence as follows:

> 'When giving the sentence, the chair asks the offender is he is in agreement with the punishment given to him. Then he also asks the one who has won the case if he agrees with the punishment given. If they agree then an agreement is made preventing the offender committing the offence again. However, this is after asking the rest of the people present if they agree with the punishment.'[20]

[18] This point is made by T. Elias *op cit*, 248.

[19] Social fairness is a phrase I borrow from A. Sanders and R. Young, *Criminal Justice* (Oxford: Oxford University Press, 2007) 480-510 to amplify fairness as a principle in collegiate decision making. Its opposite is legal fairness.

[20] Gombolola Jo-Gem.

This quote shows that both verdict and sentence are arrived at collectively by all present- a situation not envisaged in international procedural rules.[21] This contrasts with legal fairness in international tribunals where judges as sole arbiters, make a dispassionate application of the law, focusing on the legal issue of establishing guilt or innocence. By deliberating in secret, international judges apply procedural rules to arrive at a verdict and sentence that are not subject to public discussion or scrutiny.[22] Although the international judges' knowledge assists in efficiency, public deliberation makes the system accountable to the community and commands public confidence. Social fairness is reinforced through other features: the Jo-Gem arrangement where the local council chairman sits in a quasi judicial capacity,[23] and the sitting arrangements.

-The sitting arrangements

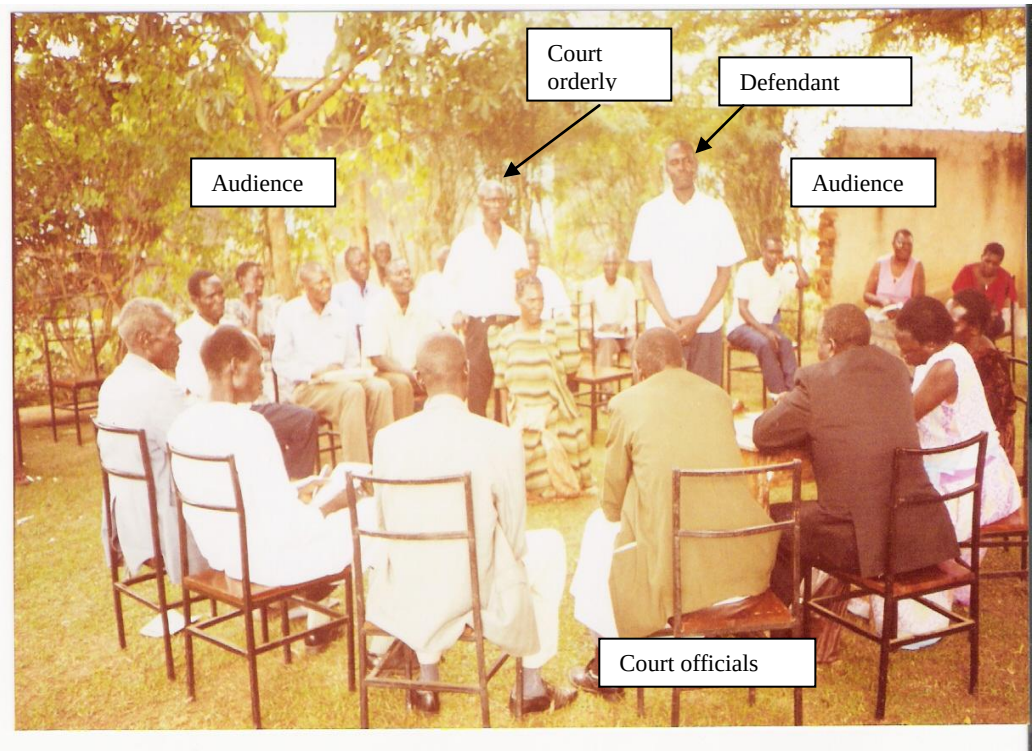

Figure 9: © Maureen Owor (2006). Trial simulation depicts the semi circular sitting arrangement.

[21] This finding contrasts with Driberg's account that there was no verdict delivered by traditional courts, rather the parties 'sensed' public feeling in matter: H. Driberg (1928) 70 *op cit*.
[22] R. Henham, *Punishment and Process* (2005) *op cit* 94, criticising deliberation of sentence *in camera* that excludes participation by interested parties.
[23] I discuss further the role of the local council 1 chairman in the next section.

Figure 9 illustrates the Jopadhola sitting arrangement, which was reconstructed during the trial simulation. According to Elias, sitting arrangements in traditional courts were casual, semi-circular, or horse-shoe: the latter two designed to enable parties to view proceedings and allow easy access and exit.[24] Figure 9 depicts the semi circular arrangement. The smaller semi circle has the judge in the middle, with the secretary to his right and Assessors (*Jo-Kony*) on either side. Other officials include the prosecutor, person in charge of rituals and the women and youth representatives. The bigger semi circle comprises the community: neighbours, family, friends, witnesses; even people from other clans. There is an opening at the sides to let people walk through. As shown in Figure 10 below, witnesses stand in a row facing the adjudicating panel with their backs to the audience. Whoever wishes to speak puts their hand up to get permission from the judge and does so while standing.

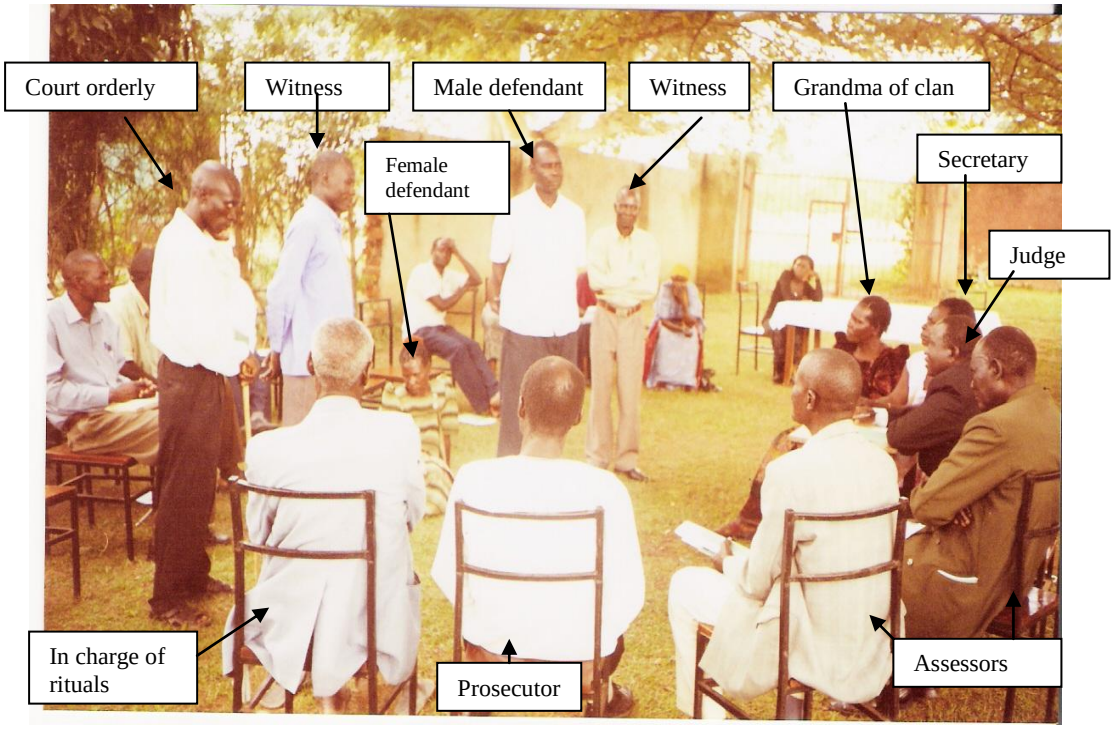

Figure 10: © Maureen Owor (2006). Trial simulation showing the taking of evidence.

During plea taking (Figure 9) and the trial (Figure 10), the female offender kneels or sits, while the male offender stands throughout. The Jopadhola have no age grade societies where people sit according to their ages, rather sitting is

[24] T. Elias *op cit* 238.

according to individual preference.[25] This sitting arrangement demonstrates that the judge and court officials are on a par with the clan members, and therefore are not infallible.

Wiredu cautions against the danger in judicious thinking of confusing certainty with infallibility.[26] Such infallibility in my view can also be expressed in other ways including the sitting arrangement. In courts of law, often the judge sits at the front of the room on a raised dais with lawyers facing the front,[27] which denotes superiority and infallibility over those present. In explaining these features called 'judge-craft', Mulcahy persuasively argues that court room designs in England keep the judge separate, enabling them to maintain control over whom and what will be heard. Space for the public is more peripheral and as public space has reduced, so has their role in participatory justice.[28] Mulchay's reasoning applies equally to international and national courts. Some may even argue, that the wearing of wigs and gowns by judges separates them even further from the locals whose clan court officials wear ordinary dress in court.

In sum, the Jopadhola model uses a participatory approach to determination of sentence comprising shared procedural functions, fortified by a semi-circular sitting arrangement. Within this context, decision making is underpinned by judicial fallibility. This approach appears to protect what Ikuenobe aptly describes as a 'moderate' sense of individual autonomy. Ultimately, tensions arise because of normative divergence between individual rights and communitarian values. Similarities also exist. I appraise both issues in Section 3.

[25] F. Burke *op cit* 215 points out that the Jopadhola had no age grade system like the neighbouring Iteso.
[26] K. Wiredu, *Conceptual Decolonisation in African Philosophy: Four Essays* (Hope Publications: Ibadan, 1995) 27.
[27] S. Byakutaga *op cit* 132.
[28] L. Mulcahy, 'Architects of Justice: The Politics of Court Room Design' (2007) 16 (3) *Social and Legal Studies* 383-403, 390-396. Court room designs in England, she observes, seem to echo the 1884 designs that limited public access on grounds that the public were 'dirty'. 'Judge Craft': a phrase coined by Flemming et al, *The Craft of Justice: Politics and Work in Criminal Court Communities*, (Philadelphia: University of Pennsylvania Press, 1992) at 3, 4 describes how judicial officers go about their tasks in the court room.

Section 3: Managing divergence-harnessing similarities

This section analyses at the doctrinal level, the question whether 'moderate' individual autonomy protects a person sufficiently from abuse within the participatory process. The answer depends in part on whether clan courts have adequately assimilated rules of natural justice from the Local Council court, with which they are more closely associated. It also depends to what extent individual rights are 'abridged' by social responsibilities and communitarian values. I conclude that clan courts attempt to mitigate any abuse through the participatory process itself.

According to study participants, clan courts; local council courts and courts of law have in common, laws that govern trials:

> 'Local Council or government have a book containing laws, like the clan who also have their by laws. Our laws start as a customary law of the clan from down in the Kisoko, Miluka, Gombolola, Saza to P`Oriwa. The government magistrate emphasised that this is proper and that is what is applied in the clan courts.'[29]

Despite this claim to similarity between the systems, there are some marked differences identified in the literature.[30] I use Bennet's categorisation of points of conflict[31] to undertake a thematic appraisal of the participants' views on reconciling these marked differences under the following sub themes: patriarchy versus equality, punishment and human rights, guaranteeing impartiality of the tribunal, rights versus duty to protect kin, rights versus communitarian values and judicial discretion versus freedom of expression. I also examine participants' views on enhancing similarities in language of choice and conducting trials without undue delay.

(i) Patriarchy v equality for women and youth

From the outset, study participants were willing to find ways of reconciling the traditional with the international notion of procedural rights. One significant finding was the transformation of clan courts from bastions of patriarchy to courts that are representative of women and the youth. Participants spoke of how transplanted law may not address power imbalances between victim and offenders.

[29] Saza Morwa Guma.
[30] T. Bennet (1991) *op cit* at 23 notes 40-43 citing works by Donnelley (1982), Howard (1986), Mbaye (1982) and Mojweku (1982).
[31] Bennet's points of conflict outlined in Ch. 3 S. 3 (iii) *op cit* are: individual rights versus community values, rights versus duties; principle of patriarchy versus freedom of thought or speech.

Traditional process, participants reasoned, gives the offender a voice, allows the victim to say everything on their mind and the court ensures that there are no hard feelings. More importantly, women and youth representatives ensure their constituents are protected. This is in clear opposition to widely held legalist critique[32] that the traditional processes exacerbate power imbalances by denying the offender, women or children a voice.

Traditional restorative justice as applied by the clan courts appears to hold promise in addressing the desires of women and youth (including children) to be heard, to have the victim's suffering acknowledged, and to hold perpetrators accountable. I am mindful of the limits of this potential because not all parties may have an equal opportunity to participate because of power inequalities. In other words, procedural equality may exist only within the dominant group. This can be explored further by using the example of the right to equality before the courts. Under Article 14 (1) ICCPR, all persons shall be equal before the courts and tribunals. Similarly, the Guidelines provide for equality of women and men in traditional court proceedings.[33]

Some have lauded the kinship system as promoting equality for all before the courts.[34] Others like Bennet, are more cautious, arguing that the patriarchal nature of society may reinforce inequality before the law because of power imbalance, especially where women and children are concerned.[35] I agree with Bennet's position because women and youth representatives, participating both as spokespersons for their constituents and as individuals, have no equality in real terms. As Skelton and Sekhonyane convincingly argue, power imbalances like age and gender, affect consent to participate.[36]

[32] The critiques include works by T. Bennet and A. Skelton and M. Sekhonyane *op cit*.
[33] S. Q (4) Guidelines *op cit* and African Charter *op cit* Article 3. Article 21 (1) Uganda constitution *op cit* provides for equality before the law in all spheres of cultural life and enjoyment of equal protection of the law.
[34] O. Elechi *op cit* 63-67gives an expose of these views.
[35] T. W Bennet, *Human Rights and African Customary Law* (Cape Town: Juta publishers, 1999). In *Human Rights and African Customary Law under the South African Constitution* (Cape Town: Juta publishers, 1995), Bennet persuasively argues that attaining procedural equality does not tackle the cause and conditions of inequality: 88.
[36] A. Skelton and M. Sekhonyane *op cit* 585, citing Skelton and Frank (2004). Other power imbalances may include disabled, learning disabled and other vulnerable groups.

Let me illustrate using the *Re O. Odoi and L. Okongo* case from Morwa Guma, Saza Namwaya (hereafter 'the *Odoi* case').[37] The facts are that sometime in 2002, Olweny, son of L. Okongo, eloped with Awor, the daughter of K. Onyango. Olweny and Awor, both minors from the Morwa Guma clan, started living together at the home of Okongo. This act contravened the Morwa Guma law on 'marrying a relative' (incest).[38] The case was heard by the Namwaya Saza court. Direct evidence was given by Onyango (the father) on behalf of Awor (accused) and her mother:

> 'I went and found L. Okongo with his son and they admitted to me that they had married my daughter. I came back and I told the mother, then the mother said "The daughter of my sister is at that home therefore let my daughter stay."'[39]

Apart from the husband giving testimony on behalf of his wife, the transcript shows that deliberations on sentence were between parents, other relatives and clan members: all male.

Likewise, during the trial simulation, only three women and one youth spoke, not to interpose, but only when called upon to speak by the chairman-cum-judge.[40] This suggests that although none of the women or youth participants cited gender or age inequality as a problem, power relations among the Jopadhola may not have changed much since the pre-colonial times. As Bennet argues, patriarchy denies women (and youth) the *locus standi in judicio,* because of the assumption in customary law that they are not 'versed in the forensic arts and accordingly need someone to argue their cases for them'. Though they are not denied their action, they need assistance to bring it through a guardian[41]- in our case, the father and husband. In the event, although the boy exercised his participatory 'right' as an offender by querying the payment of a bull to the girl's side,[42] the girl herself said nothing.

The sentence 'agreed' involved removing the girl from the boy's home. It is questionable whether this was an appropriate sentence especially since there is no

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[37] *Re O. Odoi and L .Okongo,* Decision of 24/02/2002 (Ssaza Namwaya, Morwa Guma Court). Transcript is on the file with the author.

[38] The Morwa Guma constitution *op cit,* Chapter 17 para.13 analysed in Ch. 6 (i) *op cit.*

[39] Transcript of *Odoi* case, *op cit,* para 5.

[40] These were: the secretary who cited the law contravened; grandmother of the clan calling for purification; and the mother of the girl calling for a stiff punishment. The youth (*Okewo*) only spoke to affirm his readiness to perform the purification ceremony. The only exception was the female eyewitness who interjected to give evidence as a neighbour.

[41] T. Bennet (1995) *op cit* 89-90: citing *Mashinini* 1947 NAC (N&T) 25 and *Ngcamu v Majozi* 1959 NAC 74 (NE).

[42]Transcript *op cit* para.16: 'The boy who is married to the relative asked that "This cow, why is it being paid?"'

record of her saying anything about it. In the interests of justice, her opinion ought to have been sought because there was evidence that she was pregnant. This would in turn affect decisions on her welfare and where she would prefer to live after giving birth. The decision to forcibly remove her from her lover's home left these issues unaddressed.

In sum, the *Odoi* case exemplifies Bennet's argument that power inequality within society affects equality before the law. The clans may argue that this is a misunderstanding of tradition because the law is there to protect women and youth which is why taboos and criminal laws proscribe acts against the dignity of the individual.[43] Although there is something in this position, I suggest that the process by which the sentence is arrived at is parochial. This undermines the rights of women, youth or vulnerable groups, by inadvertently 'abridging' the individual right to participation in the proceedings.

(ii) Traditional punishments and human rights law

One surprise finding was that most participants believed international human rights had something positive to offer when compared with communitarian values. Study participants were not oblivious to the conflicts with human rights law which they identified during the plenary discussion. Their views reflected their concerns, particularly regarding the purification rituals for incest:

> 'Some punishments like burning and running through thorns are harsh.
> There is cruelty to animals. For instance, the innocent dog is punished.
> Stripping an offender naked is a violation of their dignity.
> If one is running naked and meets relatives or in laws, this increases their chances of getting *lusiwa* (bad luck).' [44]

These statements are significant because they illustrate the extent to which clan court members view the notion of autonomy of the individual, even in mandatory purification rituals. Aspects of the purification rituals identified where human rights could be violated included stripping naked of the offenders. Ironically, purification rituals may also result in yet another potential breach of taboos: if the naked offenders met in-laws or relatives that could attract more *lusiwa*. The participants' orientation towards human rights awareness was shaped by their exposure to the local council

[43] Plenary discussion, field notes.
[44] The purification ritual for incest is described in Ch. 6 S. 6 (ii) *op cit*.

courts and national courts, and following of debates on radio, television and in newspapers (the latter two, for the more educated, affluent participants).

Participants' views quoted above also highlight two conflicting issues in substantive human rights law. Firstly, some punishments and rituals violate international human rights despite their legitimacy under Jopadhola clan law. Punishments like whipping and rituals that involve stripping offenders naked and burning with fire, are prohibited by international law as cruel, inhuman and degrading treatment under Article 7 ICCPR, and Article 5 African Charter. In *Kyamanywa Simon v Uganda*,[45] corporal punishment (whipping) was also declared a violation of Article 24 of Uganda's constitution that prohibits cruel, inhuman and degrading treatment, by the Constitutional Court. The decision followed a referral from the Supreme Court on the question whether mandatory strokes of the cane for the offence of robbery under Section 274 (A) of the Penal Code contravened Article 24 of the constitution.[46]

Another punishment is banishment. Where offenders are found guilty of witchcraft under Jopadhola law, a woman may be banished from her home, a man from his clan, or both from the village.[47] The rationale is to prevent further acts of witchcraft that may harm people. Still, banishment from one's home violates the right to property contrary to Article 17 (1) ICCPR and Article 14 of the African Charter. In *Uganda v Salvatorio Abuki*, the appellant was convicted of witchcraft under Section 3 (3) of Witchcraft Act for causing illness to three of his neighbours. The Grade II Magistrates' court sentenced Abuki to 22 months imprisonment and issued an exclusion order banning him from 'that home' for 10 years.[48] On appeal, the Supreme Court in *Attorney General v Salvatorio Abuki* declared that a banishment order under the Witchcraft Act was cruel, inhuman and degrading treatment under Article 24, because an offender is deprived of shelter and means of earning a living from their land. Banishment was also declared to be a violation of the right to property under Article 27 (2).[49] Arguably, the Supreme Court decision viewed in the context of

[45] *Kyamanywa Simon v Uganda* Constitutional Reference 10 of 2000.
[46] *Kyamanywa Simon v Uganda* Supreme Court Criminal Appeal No. 16 of 1999. *Kyamanywa* (2000 decision) was applied in *Oryem Richard and another v. Uganda* S.C Criminal Appeal No.2 of 2002.
[47] Morwa Guma.
[48] *Uganda v Salvatorio Abuki* Grade II Magistrate Ct Cr Case No. 105 of 1995. Under S. 7 (3) *ibid*, 10 years is the maximum term of banishment.
[49] *Attorney General v Salvatorio Abuki* S. C Cr App No.1 of 1998 *op cit*: per Wambuzi C.J., 277, 280.

Section Q of the Guidelines on traditional courts, applies *mutatis mutandis* to clan courts' sentencing decisions.

A second conflicting issue is that under Jopadhola normative standards, compensatory sanctions are considered more restorative than the international penalty of imprisonment. This poses a significant challenge to international law. The study participants stressed that imprisonment is not recognised as a punishment under clan laws. This is because the rationale for punishments for all crimes (including murder) is not to deprive an offender of their liberty, an inalienable right in Jopadhola clan law, but to restore the equilibrium. By contrast, participants viewed imprisonment as retributive and inhumane because it deprived an offender of their right to liberty. As we saw in Chapter 6, although offenders may be imprisoned on the orders of a clan court, this is allegedly done by Magistrates' courts in connivance with *some* clan courts.[50] Additionally, the Jopadhola do not have the death penalty so the right to life is well protected.[51] There remains an impasse between international and traditional purposes and types of punishment, with implications from a substantial rights perspective. Even so, an acknowledgment by clan court officials that some punishments are inhumane, indicates a willingness to apply international human rights in their own normative context.[52]

(iii) Guaranteeing impartiality of tribunals

One component of the right to procedural fairness is institutional guarantees of independence and impartiality within the structure of tribunals. The question of independence of traditional courts is for national legislation under Section Q (c) of the Guidelines, but no legislation is in place yet in Uganda. The guarantee on impartiality provided in Section Q (d), nevertheless enjoins traditional courts to decide cases without any 'restrictions, improper influence, inducements, pressure, threats or interference, direct or indirect, from any quarter.'[53]

[50] Only 2 out of the 7 groups mentioned using Magistrates courts to imprison offenders: Ch. 6 S.6 *op cit*.

[51] This is unlike the Karamojong (Nilo Hamitic group) who still apply the death penalty in their clan courts: *Human Rights and the Search for Peace in Karamoja,* Uganda Human Rights Commission 2004 Special Report paras 5.25-5.27.

[52] This draws parallels with An-Na`im's 'internal re-interpretation' of tradition, discussed in Ch. 3 *op cit*.

[53] S. Q (d) Guidelines *op cit* adopts Article 14 (1) ICCPR *op cit*. The impartiality of a traditional court may also be undermined if a member has:

1.1 expressed an opinion which would influence the decision-making;

Does the working of the structures guarantee impartiality as provided in the Guidelines? Impartiality was discussed as part of the challenges faced by clan courts. There were no complaints about officials having a pecuniary interest in matters before clan courts. However, study participants identified threats to clan courts by the government, the parties, and the partiality of court officials in cases involving their relatives.

A growing problem of executive and judicial interference was identified where the national courts send the police to arrest officials. National courts were also accused of not responding to the pleas from clan courts to return cases that involve purification and reconciliation rituals, where the national courts lack appropriate 'jurisdiction':

> 'There are cases like cursing, *lusiwa* of a clan nature that have to be heard by the clan. The government cannot perform all the details of the rituals.'[54]

This hostility from the national judiciary was viewed with regret, but the study participants were determined to deliver justice impartially and carry on their work. The Tororo Chief Magistrate acknowledged this impasse, noting the authoritative power of the clan court was such that they ignored judicial orders that reversed their decisions, and stood by their previous ones.[55]

Threats to clan court officials by individuals are exemplified in the *Odoi* case:

> 'Mr. Okongo M of Namwaya stood to speak and said "I have said lots of words but the *Ja Kisoko*, *Ja Muluka*, *Ja Gombolola*, what are they doing in this matter so that we sit as a clan to correct or discuss this?" The *Ja Ssaza* answered "Since it was said that Okongo L is angry nobody could sit and hear the matter. That is why I had the power to say we sit and determine the matter."'[56]

In this exchange, Mr. M. Okongo is demanding to know why all the chairpersons of the lower court bench were hearing the case. The Saza chief's response is that the lower courts' impartiality was compromised by the offender's father's confrontational behaviour. Accordingly, the Saza court would hear the case with a 'mixed' bench to ensure impartiality.

1.2 some connection or involvement with the case or a party to the case;
1.3 a pecuniary or other interest linked to the outcome of the case.
2. Any party to proceedings before a traditional court shall be entitled to challenge its impartiality on the basis of ascertainable facts that the fairness of any of its members or the traditional court appears to be in doubt.

[54] Gombolola Morwa Guma.

[55] Interview on 16th August 2006 with Mr. P. Rutakirwah, who pointed out that the decisions he overturned related only to land disputes.

[56] Transcript *op cit*, para 7.

Study participants did not accept that adjudicators hearing cases involving their own relatives negated the guarantee of an impartial tribunal. Nonetheless, their comments indicate that partiality can be an issue in fact:

> 'If the matter affects relatives of the court elders, they do not want to sit in the hearing of the case and when they do they usually sympathise or forgive their relatives.'[57]

Arguably this dilemma could be addressed by reference to the rules of natural justice contained in the LCC Act, where a local council court in exercising its jurisdiction 'is guided by the principle of impartiality without fear or favour' (Section 24). Additionally, any member with an interest of whatever nature in the issue is disqualified from hearing the case (Section 24(d)). Applying this provision is not so straight forward. Previously, I outlined the correlation between membership of clan courts and local council courts, as well as their close working relationship.[58] Studies have shown that it is not always the case that local council officials enforce government laws because it is established that these officials are chosen from people who respect local traditions.[59] Still, these studies do not investigate what proportion of clan court officials also sit on the Local Council court and are therefore arguably in a stronger position to apply 'foreign' norms like natural justice in clan courts. I established that of the 25 study participants- all of whom sit in the clan court, 7 from both clans indicated that they were Local Council 1 officials.[60] It follows that in theory, some clan court members ought to know the rules of natural justice applicable in the local council courts, especially since the role of the Local Council 1 chairman in Jo-Gem courts is to provide some sort of legal oversight in such a dilemma.[61]

Despite a lack of evidence on the frequency of such occurrences, the quote above of the Jo-Gem respondents indicates a failure to apply this principle of impartiality. It may be argued that adopting a participatory approach acts as a check against such violation, especially since the chairman and other clan court officials

[57] Kisoko Jo-Gem.
[58] Ch. 6 S. 5 (1) *op cit*. The Jo-Gem courts have the Local Council 1 Chairman sitting as a member of the court. Although the Morwa Guma courts invite the Local Council officials to participate as ordinary clan members in clan court cases.
[59] B. Baker *op cit* 342, J. Barya and J. Oloka-Onyango *op cit* part IV, also citing J. M.N Kakooza and J. Okumu-Wengi, *A review of literature and basic data on the LC Court system in Uganda*, Judiciary Programme Danida (Kampala, 1997).
[60] Self description in attendance sheets: details in Appendix 3-List of study participants.
[61] Rules of natural justice are set out under S. 24 LCC Act discussed in Ch. 6 S.5 (i) *op cit*. The dilemma could be whether participation in the adjudication of a relative's case comprises an interest in the context of duty to kin under S. 24 (d).

may be corrected if they err on procedure. This enables any party including the audience, to identify instances of partiality that may compromise the sentencing process so they are dealt with immediately.

(iv) Individual rights v duties

I stressed in Chapter 5 that the dilemma of reconciling individual rights with duties and rights of others, has not been resolved in the African Charter. These concerns have been addressed in the literature but it is the manner in which clan courts handle this normative divergence that is not well understood.

(a) Right to legal representation v duty to protect kin

There is a dearth of literature on the right to legal representation in international sentencing hearings, which may be because of an assumption that legal representation is guaranteed in the sentencing stage of the trial. As Bassiouni observes, representation by counsel is 'paramount to the due process of law and to the integrity of the judicial process.'[62] The Guidelines provide that in proceedings before traditional courts an offender may seek assistance and may be represented by a representative of choice. This incorporates the ICCPR due process guarantee for a defendant to have legal assistance or counsel of choice.[63] The principle behind this is to ensure that the interests of the accused are fully protected during trial.[64]

Lack of legal representation is seen as a major obstacle to attaining standards of international procedural justice in kinship and state-managed traditional courts.[65] Nevertheless, some maintain that this right must be analysed in a traditional context. Nhlapo for example argues that lack of legal representation in traditional societies is

[62] M. C Bassiouni (1992-1993) *op cit* 283; K. Apuuli *op cit* 183.
[63] S. Q (a) Guidelines *op cit*. Likewise Article 28 (3)(d)(e) constitution *op cit* provides for a lawyer of one's choice and state legal representation for capital offences with a sentence of death or life imprisonment. The importance of this right under Article14 (3) (b)(d) ICCPR *op cit*, was underscored by the Human Rights Committee in *Michael and Brian Hill v Spain* Communication No. 526/1993.
[64] M. Bohlander, 'A Fool for a Client-Remarks on the Freedom of Choice and Assignment of Counsel at the International Criminal Tribunal for the former Yugoslavia' (2005) 16 (2) *Criminal Law Forum* 159-173, 168. M. Damaska, 'Assignment of counsel and Perceptions of Fairness' (2005) 3 (1) *Journal of International Criminal Justice* 3-8, points out that the right is not absolute and can be restricted as it was in *Milosevic's* case (IT-02-54-T).
[65] Ch. 4 S.3, *op cit*. Also K. Apuuli *op cit* 183- 186 on Gacaca courts under Rwanda Organic Law. M. Senyonjo (2007) *op cit* 64-65, likewise criticizes Acoli *Mato Oput* traditional mechanism for the lack of due process safeguards like the right to legal representation to the offender.

justified because the courts apply customary law, so emphasis must be placed on traditional modes of dispute settlement. He maintains that excluding legal representation is not necessarily a bad thing because this may help ameliorate power imbalances and make it possible for every person (including women) to cross examine witnesses and voice an opinion. It also preserves the non-technical nature of customary deliberations. Nhlapo does acknowledge that this position is unacceptable in western procedures.[66]

As we saw in the previous chapter, the Jopadhola, not being a chiefly society, had no system of legal representation because it was the duty of all kin to represent any party. Therefore when asked who is permitted to make representations on behalf of the offender, the study participants found it difficult to answer. Participants could not comprehend the notion of an offender needing *legal* representation, when all people may speak on his or her behalf, especially since there is no burden of proof. They pointed out that the judge, chair of the court, any person who knows details of the offence (witnesses), clan members, neighbours and the Local Council officials; could speak on the offender's behalf or intervene where necessary.

In this regard, although Morwa Guma courts have a prosecutor in the higher courts there is no defence lawyer. Morwa Guma participants reasoned that this does not create procedural inequality of arms because any person may speak in defence of the offender. The Jo-Gem courts are organised in an apparently more neutral manner, with the Local Council 1 Chairman acting as 'legal' advisor. Without evidence, however, it was difficult to evaluate the extent to which the Local Council chairman helps the clan court ensure equality of arms or provides quasi-judicial 'oversight'. From the responses, it appears that the clan court inevitably applies its own concept of representation as described here.

[66] R.T Nhlapo, 'Legal duality and multiple judicial organization in Swaziland: An analysis and a Proposal' in P. Takirambude (ed.) (1981) *op cit* 71.

(b) A right to 'judicial' review

The Guidelines provide that an aggrieved person may appeal to a higher traditional court, administrative authority or judicial tribunal,[67] but scant literature exists on how this right is applied by traditional courts.

The participants identified the right to 'judicial' review as another area in which there is similarity between the national and traditional systems. Any person may seek review on behalf of any party, through the higher traditional courts.[68] Grounds for review could be a harsh, unconscionable sentence, or unfairness of the sentencing process. Morwa Guma Saza court gives 14 days within which to seek review though this is not strictly adhered to;[69] whereas the Jo-Gem courts have no time limits. The process of review was described as follows:

> 'If the people are dissatisfied with the punishment they can give court wisdom on how to find an alternative sentence that is suitable for the offence and the offender. These people include those from other clans who can come and listen to the case. These could be neighbours or friends.' [70]

This quote exemplifies the duty of kin in the review process. The community also reviews fairness of trial proceedings; deliberates afresh on sentence; and assists in eliciting evidence on mitigating or aggravating factors like possession by spirits:

> 'The court must ensure that the punishment is commensurate with the offence based on the offender's behaviour everyday in the neighbourhood. The offender might be cursed, has mental health problems or is possessed by spirits like *Bura*.'[71]

Community input is thus invaluable in determining whether or not to vary or review sentence.

Another notable feature of the review is the flexibility to opt out of the proceedings. This flexibility, participants explained, enables any party to seek a transfer of the case to a national court of law if they fear the clan may be unfair to them. Participants also pointed out that some victims file cases in both the clan courts and the government. The victim's reasoning is that if the clan court is unfair, the

[67] The Guidelines *op cit* S.Q (b) (11) adapts the right to judicial review in Article14 (5) ICCPR. The Uganda Bill of Rights Article 28 *op cit* does not provide for judicial review.
[68] Gombolola Jo-Gem.
[69] The rest of the Morwa Guma courts did not indicate any time limits.
[70] P`Oriwa.
[71] *Ibid*.

government will not be so, and vice versa.[72] Participants stressed that parties were within their rights to opt out of clan court jurisdiction, but cautioned that:

> '[T]heir problem will continue to increase because it was not cleansed. For example: cursing, theft, witchcraft, adultery or fornication, murder or spirit possession. All this behaviour if the clan does not cleanse as it is required, then even if the government imprisons a person for 10 years, still these tendencies will remain. This behaviour retards the clan until the person is cleansed in accordance with traditional rites.'[73]

Accordingly, opting out of clan court jurisdiction allows aggrieved parties to seek legal redress, thereby protecting the right to seek judicial review. This is subject to one caveat. If the offender is possessed by spirits and these are not removed by a purification ritual, then the well being of the clan is in jeopardy. This is more so because courts of law lack the 'jurisdiction' and 'competence' to conduct these purification rituals. Judicial review is therefore enforced through participatory justice that allows individuals to opt out of clan court jurisdiction. Still, the 'problem' may require spiritual intervention by the clan.

(v) Individual rights v communitarian values for *Ji Jie* (all people)

Participants had strong misgivings about international law bending to accommodate communitarian values. These concerns have been raised in the literature. In Chapter 3, scholars warn that the test for international criminal justice is its capacity to visualise forms of justice other than the 'western' style trials that leave communitarian values unprotected.[74] Baines argues, quite rightly, that spiritualism is a critical area of reconciliation and reconstruction of the lives of offenders, victim and the community.[75] Cockayne also observes that international criminal tribunals often administer international criminal justice in a manner far removed from the values and politics of the traditional communities.[76] All views correctly depict that offenders and victims alike, may feel unprotected by a 'western' trial procedure that does not address these concerns.

Study participants expressed concern that an international court, would not understand *how* communitarian values protect the clan and the individual from evil forces. International courts have practical limitations since they lack the 'jurisdiction'

[72] Miluka Jo-Gem.
[73] P`Oriwa.
[74] A. Garapon *op cit* cited in Ch. 3 S.2 *op cit.*
[75] E. Baines *op cit* at 114.
[76] J. Cockayne (2005) *op cit* 460, 464-465 cited in Ch. 4 S.5 *op cit*.

to perform rituals. Only the clan can do that.[77] Crucially, the international model makes no reference to reconciliation, restitution or the role of ritual *as* communitarian values. As we have seen, this may be explained by the fact that the international model is grounded in philosophical and human rights frameworks that have no place for spiritualism and collective responsibility. To make my point, the following examples will suffice.

(a) Mandatory purification, and social obligations

Purification rituals are mandatory in certain circumstances. The exception is in the case of minors. In the *Odoi* case for example, the *Ja Saza* chair informed the offenders that the purification ritual would be waived because they were young.[78] Conversely, in the trial simulation, the adult female offender pleaded for a less severe whipping during the purification ritual, but the judge said she would be whipped in accordance with clan law. One explanation given for strict adherence to clan laws is 'to ensure that laws of government are not entered into too much'.[79] This statement suggests that Jopadhola laws and rituals take precedence over individual autonomy. To this end mitigating some of the harsher aspects of rituals (like whipping) may be difficult.

The duty of protecting the clan from misfortune falls squarely on the clan court. This was evident in the *Odoi* case, where the court wavered between applying a harsh sentence to avert misfortune, and remaining within the ambit of local council laws:

> 'We said those girls who stayed with relatives should be chased out that day. But now the law is in conjunction with local councils. That is why we have to correct it and consolidate *and return to the line*.'[80]

'Returning to the line' implies that clan law has to be read in consonance with the Local Council laws. There is no indication of how the clan law should be 'corrected and consolidated' to return to the 'line', but an alternative solution was sought by some clan members to enable the two offenders get married:

> 'One gentleman Dismas … asked the father of the girl: "Will you be willing to accept the marriage payment (dowry) for your daughter?" Onyango answered that he is willing. Then the uncle of the girl, Mr. Owino stood up and refused

[77] Plenary discussion.
[78] Transcript *op cit*, para 16.
[79] P`Oriwa.
[80] Transcript *op cit* para 10: My emphasis.

> saying as the uncle of the girl, the child cannot stay at the home of Okongo as a Morwa Guma.
> Mr. Odaka (…) went on to say that "Okongo, if you still want to stay with the girl at your home than let us bring the staff of Morwa, we curse you and you get out of Morwa Guma."'[81]

The fear of being cursed and banished from the clan, led both fathers to agree to take away the girl from Okongo's home. Furthermore, 'marrying a relative is abominable and will ruin relations amongst clan mates.'[82] In short, the clan court has no obligation to positively protect individual rights but has to ensure that the clan is protected from misfortune (*lusiwa*). Further, spiritualism may abridge individual rights by 'overriding' individual choice and autonomy.

(b) Restitution, Reconciliation, and the role of ritual

Study participants described the aim of the sentencing process as follows:

> 'The clan give a sentence based on the strength of the offence, means of the offender, while aiming at uniting (*riwo*) the complainant and the offender.'[83]

Following delivery of sentence an obligatory reconciliation feast is held because the clan are 'only there for the sole purpose of deciding the case between them'.[84] The aims of the feast are much the same as other ethnic communities in African countries like Rwanda or Sierra Leone.[85] The main difference here is that the Jopadhola reconciliation feast is paid for with money called *Pawo*.[86] Uniting parties and reintegrating the offender following rehabilitation, recapitulates the literature that says the process of harmony and equilibrium is restored to the community once it is understood the offender has paid his or her dues.[87] Rituals reinforced by supernatural beliefs, complete the reparation processes. Examples of two Morwa Guma real-life cases will suffice.

[81] *Ibid* paras 8 and 11.
[82] Prosecutor's opening statement in the trial simulation.
[83] P`Oriwa.
[84] P`Oriwa.
[85] Ch. 4 S. 3 and 5, *op cit*.
[86] *Pawo* is paid to initiate a case by the complainant/victim in the court. *Pawo* is a fixed amount for all the Jo-Gem courts at 3,000/= (0.80p); refundable if the defendant is found guilty. It is used exclusively for buying local beer (*Kongo*) for the feast. The Morwa Guma concept of *Pawo* is more like a modern notion of court fees that is incremental, depending on the hierarchy of the court. Unlike in the Jo-Gem courts, money for the feast is paid for separately by whoever loses the case.
[87] Ch. 2 S.2 and 3 *op cit*, discusses literature like O. Elechi *op cit*, 19, 26-29.

In *Auma v Apio*[88] mother-in-law and daughter-in-law uttered abusive (swear) words towards each other, which is taboo. Both parties pleaded guilty before the clan court. They were each fined a chicken to remove the bad luck *–lusiwa* (signifying healing), and directed to take part in the reconciliation ritual of biting a chicken bone together (*kayo choko*) and share a feast with the clan.

In *J. Okoth v Y. Okoth,* [89] the son accused his father of kicking down the door to his house, which is a taboo because the son was married. At a family meeting the father admitted the offence, but said he was responding to an alarm raised by his daughter-in-law. Although the father nonetheless agreed to pay the fine of a sheep and a cockerel to remove the bad luck, his son insisted that the clan be invited to adjudicate the matter. The clan court endorsed payment of the fine and the son was also ordered to give the clan a cockerel. A reconciliatory feast followed.

In both cases, any supernatural consequences that may befall the family were forestalled through the reconciliation ritual that reintegrates the offender, completing the restitution process. Rituals that restore social harmony are regarded as more effective than adopting a strictly legalist approach, for instance to establish whether the pleas were unequivocal.

Another example is the removal of a verbal curse (*lami*):

> 'We have to look for the reasons that brought about the cursing and look for the witnesses. If the person being cursed made a mistake, the person is given a punishment and has to ask for forgiveness in front of the clan. The curser is told to correct the curse. If the curse was truly uttered, the appropriate punishment and a reversion of the curse are ordered by the clan; including payment to the clan. To decide this case, there must be witnesses, chiefs, neighbours and other people.' [90]

After hearing the case on its merits, the victim who initially 'wronged' the offender must first make amends, like paying reparation to the defendant. The hearing of the case culminates with rituals to remove the curse,[91] and a reconciliation meal between

[88] *Re Auma and Apio*, Decision of 18/12/ 2005 (Gombolola Morwa Guma court).
[89] *Re J. Okoth and Y. Okoth*, Decision of 28/01/2006 (Gombolola Morwa Guma court).
[90] Ssaza Morwa Guma. *Lami* is cast by someone in a parental or filial relationship who feels wronged by a grandchild, sibling or sibling's children for acts like insolence, non payment of dowry or an outstanding debt. The curse is believed to bring misfortune to that individual. The most feared 'cursers' are paternal uncles (*Ba mere*), maternal aunties (*Min*), any grand parent and an older sibling who is the heir (and possesses the spear of the home) or heiress. However, it is believed that curses by biological parents cannot afflict a child. *Lami* is one offence where compensation may be paid to the clan as well.
[91] I observed removal of a curse at a home in Iyolwa sub-county on the 12th August 2006. Ms. A owed money to her Uncle Mr. O, and he allegedly cursed her after requesting the money in vain. She was to suffer problems in life. At a family gathering, testimony was heard from neighbours and in-laws on the

the two parties and clan. The fact that the clan may also get reparation from the offender, means that restitution to the clan bears as much importance as protecting rights of the individual to a fair hearing. This is apparently in direct opposition to the position of the African Commission in the *Constitutional Rights Project case* that stressed greater protection of an individual's rights over the rights of others.[92] The participants nonetheless, emphasised that what is of utmost importance is for the court to restore social harmony, while forestalling any evil that may befall the entire family (or clan).

Reconciliation, interlinked with rehabilitation and reintegration are an imperative for serious crimes under Jopadhola clan law. Take the example of murder whose processes remain largely unchanged since pre-colonial times. The bereaved family is paid as restitution a cow (*dhiang luk*) and one sheep: for Jo-Gem; or two cows, one sheep and a black chicken for Morwa Guma.[93] The cow(s) must never be slaughtered, given away (as dowry) or sold, for it is believed this will bring bad luck to the bereaved family since the cow is meant to provide a livelihood for them.[94] Following restitution, a sheep is slaughtered and eaten at a feast shared by both the bereaved family and offender's family and clans. A reconciliation ritual of *kayo choko* follows where the bereaved family's representative and offender bite a thigh bone of a chicken together. Study participants stressed the importance of these rituals cannot be underestimated. The rituals must be performed whether or not there has been a trial in a court of law and a guilty verdict delivered. This imperative arises from the superstition that the ghost (*tipo*) of the deceased will haunt the offender and his family and wreak vengeance. This ritual forestalls such evil, but also serves to rehabilitate and reintegrate the offender into society. In all, the findings affirm the

circumstances surrounding the curse. Mr. O, without admitting liability, collected a chicken to perform the removal of the curse. This was regarded as proof of guilt by those present. He put the chicken in Ms. A's hand, then she drunk water from his right palm as he uttered words to the effect that the curse would be removed. This took place in front of Mr. O's house with neighbours and in-laws present. Later at Ms. A's home, the chicken was left to roam inside the house till it found its way outside and the curse was considered broken. The following morning a court case that had been pending for two years against Ms. A (in an unrelated matter), was dismissed for want of prosecution. This was regarded by her family as incontrovertible evidence that Mr. O had indeed cursed his niece then removed the curse. This view is still widely held within Ms. A's family.

[92] *Constitutional Rights Project* (1999) *op cit* paras. 41-42 discussed in Ch. 5 S. 2 (iii) (b) *op cit.*

[93] This affirms the argument that compensation in homicide cases was a continued means of support putting to an end intra- family feds and vendettas: Nsereko (2002) *op cit* 24 citing Katende, 'Why were punishments in Pre-European Africa mainly compensatory rather than punitive?' (1967) *Journal of the Denning Law Society* 2. Also Shaidi *op cit* at 2, discussing sanctions in the Kilimanjaro area of Tanzania argues that compensation and reconciliation was aimed to prevent enmity within chiefdoms.

[94] Morwa Guma participants cited cases where bad luck befell families that sold the *dhiang luk*.

literature, and underscore the centrality of supernatural beliefs in traditional restorative justice.

(vi) Judicial discretion v freedom of expression

Participants had strong misgivings about international law bending to accommodate a traditional notion of procedural fairness. Their major concerns were that judicial discretion may undermine the traditional notion of equality and even handedness. This would circumscribe the participatory 'right' to be heard in the context of 'face to face' justice, or social fairness.

We saw in Chapter 2, that international sentencing procedure does not permit full participation of victims, offenders and the community in determining sentence because deliberations are done in secret by the judges.[95] Such legalistic criteria arguably undermines the traditional notion of even handedness, may neglect the social context, arguably leading to sentencing decisions which are unstructured and pragmatic.[96] This criticism that an unstructured sentence is evidence of exclusion of the social context is valid as I now show.

International sentencing rules may inadvertently restrict the freedom of oral expression under Article 19 (2) ICCPR in a traditional context where oral expression is a 'right'.[97] The participatory approach enables clan court officials to apply a criterion that focuses not only on individual criminal responsibility, but also enables the court to promote consequentialist objectives. The clan court involves the community in evaluating individual criminal responsibility by taking direct evidence on factors like: family background, behavioural patterns, personal traits, community views on the offender's character; and previous conduct:

> 'The sentencing criteria is based on what the offender has done like having no respect for the court, despising clan elders, previous offences or convictions, always bothering others (*Jakwinyo*), rumour mongering and being a trouble-causer (*Ja fitina*).[98]

[95] Ch. 2 S. 3 *op cit* discussing Rome Statute *op cit* Articles 74, 76, 78, and ICC RPE Rules 142-5. Legal analyses are given for example by W. Schabas and R. Henham *op cit*.
[96] M. Drumbl *op cit* at 11, 55-59, makes the compelling argument that despite attempts to standardise mitigating factors by international tribunals, sentencing practice remains disparate, inconsistent and gives rise to distributive inequities. Imposition of sanction remains an afterthought.
[97] The African system allowed everyone a right to express their mind on public questions: O. Elechi *op cit* (2006) 65- 67 citing Sithole in K. Gyekye (1996) *op cit* at 153 and Z. Motala (1989) *op cit* 381.
[98] Miluka Morwa Guma.

> The elders assess the offender based on his previous behaviour from way back. The one who likes relatives or the curser, after we have heard their words, it makes us think.'[99]

These 'aggravating' factors may be considered in determination of sentence. Since evidence gathering is done jointly with the community, there is sufficient information on which to assess culpability. Additionally, a rigorous consistency test is applied to assess whether testimonies of the victim, offender and community all point irresistibly to truth.[100] Crucially, the process by which a sentence is arrived at ought to be fair in the social context.

Kisoko Jo-Gem group stated that 'Where the audience also have advice for the elders of the court, then the punishment given is without argument.' However, during the plenary discussion it emerged that achieving consensus is not always possible in clan courts, which strongly suggests that freedom of expression is protected. This may be because judicial discretion is circumscribed by permitting impromptu interventions, divergent views on the sentence; in short, listening to the 'words of the offender and their people'.[101] 'People' includes local council officials and public servants in their individual capacity.[102] In the trial simulation, for instance, the local council official gave evidence in the matter.

Consequentialist objectives are promoted through unlimited freedom of expression. Let me illustrate with the *Odoi* case. There, the boy's father was ordered to pay as compensation to the girl's father (she was pregnant at the time) a goat, a cockerel and 5,000/= (£1.50) to host a reconciliatory feast for the clan. The transcript shows that friends of his father argued forcefully on deliberation of sentence:

> 'Mr. Okongo M. from Namwaya said that the prescribed items *(mutemwa*) are: a goat, cockerel and some money. At that juncture, friends of Okongo L who are mature protested, saying that that would be too much.'[103]

In the event, the sentence was revised after intense public deliberations. The father of the girl agreed to take only one bull. The agreement was put in writing with the

[99] Kisoko Jo-Gem.
[100] Miluka Morwa Guma: **'**The clan assess based on the person's words and that of witnesses. Also there has to be the complainant and witnesses and they bring them one by one to explain the truth of what transpired. If they state the same thing then that is the truth.'
[101] *Ibid*.
[102] P`Oriwa.
[103] Transcript *op cit* paragraph 17.

names of all present appended as a sign of transparency and accountability.[104] Crucially, as the *Odoi* case shows, the Jopadhola notion of procedural rights permits individuals to exercise their 'right to oral expression' with minimum 'judicial interference'.[105]

The situation is not so straightforward in cases involving mandatory rituals. For example, in the trial simulation, both parties changed their pleas to guilty. Following the verdict, the female accused then requested to be allowed to call evidence before sentencing:

ASSESSOR 2: Thank you Judge. May I ask Mr. O if he has something to say?

Mr. O (accused): Yes, I agree, and admit to the offence.

ASSESSOR 2: Then I leave it to the Clan.

GRANDMA OF CLAN: I am ashamed at the behaviour of my fellow women as mothers and daughters. This act is a big curse called *Lusiwa*. It can only be treated and finished in accordance with the rites on *lusiwa*.

JUDGE: Mr. O?

Mr. O: I pray for leniency in the sentencing.

JUDGE: Ms N do you have anything to say?

Ms. N (accused): I pray for leniency, I did not know that he was a relative. Don't beat me very hard please.

JUDGE: Askari go and fetch the parents of Mr O and the girl.

(Parents come forward)

JUDGE: We have called you here to finalise this matter. Both parties have admitted to the offence. Now we have to decide the case.

Ms. N: Before you decide the case, call Nyachwo.

JUDGE: We shall call her. I want the parents to teach their children about relations in the clan. Children should know clan mates. We have decided that both offenders be dealt with in accordance with the law and the Okewo will go tonight and build the grass hut.

The trial simulation shows that when faced with an offender's request to call evidence *after* a plea of guilty, the courts are prepared to allow it, unlike in international tribunals. Nyachwo, however, was not called and she did not give

[104] There are 60 signatures of those present. Okongo L also agreed that if his son Olweny brought the girl Awor back to his home, he (the father) would take the blame. The agreement was signed in the presence of the clan leaders of Saza, Gombolola, Miluka and Kisoko; as well as clan members, neighbours and Local Council officials. The agreement bore names of parties, thumb prints and signature of the secretary.

[105] This approach should address fears that the victim will suffer from a lack of information on what to expect from proceedings: A. Skelton and M. Sekhonyane *op cit* 586.

evidence. This implies that the practical impact of the right to oral expression is limited because, as the excerpt shows, the duty of the court remains to enforce the purification ritual to prevent bad luck afflicting both families and clan, hence the need to 'treat and finish this'. In sum, adopting an expanded view of judicial discretion, gives a moderate sense of autonomy to the individual, subject to community interests.

(vii) Similarities: Enhanced procedural safeguards

The findings show that the right to language of choice and the right to be tried without undue delay are examples of procedural rights that are similar in both clan courts and local council courts.[106] The rights seem to be better protected under the Jopadhola sentencing process than under national, even international procedures. I demonstrate why this is possible.

The language of choice in clan courts is Dhupadhola which is understood by all parties. So there is no need for an interpreter where all parties including court officials, speak the same language. Adopting a foreign language for use in courts creates linguistic constraints that prevent people from solving conflicts through linguistic participation.[107] In the national courts, the working language is English and the evidence is then translated for the accused.[108] Moreover, there are no provisions for the court to use the language of all parties even when everybody present speaks it. It is arguably a form of denial of access to its users.[109] By contrast, traditional courts allow linguistic participation through use of local language,[110] which enables accommodation of linguistic and cultural factors.[111]

[106] S. 21 LCC Act *op cit* provides that the language of the local council court shall be the language of the area. Under S. 23, a local council court shall hear every case expeditiously. See Appendix 10 for the background to the Local Council Courts legislation. Article 14 (3) (a) ICCPR on the right to language of choice is replicated in Article 28 (3) (b) Uganda constitution *op cit*. S.Q (b) (7) of the Guidelines *op cit* only provides for interpreters in traditional court proceedings.

[107] S. Byakutaga *op cit* 125-126.

[108] S. 56 TIA and S. 139 MCA *op cit*: evidence to be interpreted to the advocate in English, affirmed in *Tifu Lukwago v S. Kizza and another,* S. Ct. Civ. App. No. 13 of 1996 per Mulenga J.S.C.

[109] The absurdity of these rigid provisions in the local context is discussed by S. Byakutaga *op cit* at note 23. Citing Khiddu-Makubya *An Introduction to Law: the Ugandan Case* (Makerere University: Kampala, 1983) 116, Byakutaga is emphatic, correctly I believe, that this form of denial of access only serves to alienate the local population even further. For example, the problems of translation to and from Kinyarwanda during ICTR trials are well documented by E. Mose (2005) *op cit* 930-931.

[110] S. Byakutaga *ibid* 135. For example, Article 50 (2) Rome Statute *op cit* specifies working languages of the ICC as English and French. This vindicates G. Nice's argument that cultural dominance through the imposition of the English language in trials is a form of 'cultural imperialism': *op cit* 386-387.

[111] This way the challenges in *Akayesu op cit* discussed in Ch. 4 *S.* 3(vi) *op cit* are minimised.

The right to be tried without undue delay[112] is dependant on two factors: the venue of the trials and the time frame within which cases are completed. Trials take place within the locality, which reduces the time to complete cases since parties are within reach and can be summoned at short notice.[113] Among the Jo-Gem, the venue for court hearings is the home of the clan court chairman where the court sits on a Saturday or Sunday. Hearings start at 10.00 am and the cases may be disposed of within a day. There were no pending cases before any of the Jo-Gem courts during this period. Among the Morwa Guma, the venue of the court varies. For easier accessibility, it may be the home of the complainant or Local Council 1 chairman's home. The courts aim to complete all cases within 3-5 hours, with the longest hearing lasting between 3-4 days. In Namwaya Saza court for example there were only 2 cases pending: 1 on land and another on *Kwero degi* (extreme sibling hatred). Adjournments are permitted because they enable both sides to reflect on the problem and come to an amicable solution. In sum, easily accessible court venues and short completion times facilitate adequate protection of this right.

By contrast, international trials are held away from the *locus criminis*[114] and take a very long time to complete.[115] This affects the legitimacy of the international trial in much the same way as national courts. National courts sit in designated magisterial, High Court and appeal circuits. These circuits do not correspond to villages, only to districts and regions. During my visit to the Grade II court in Kisoko sub-county, Tororo district I established the enormity of the problem. The magistrate was absent. I was informed that he came only on Fridays when the court sits from 10.00 a.m till 3.00 p.m.[116] Sometimes people wait the whole day then go away frustrated if the Magistrate has other courts to visit that day and does not come to court. The Chief Magistrate's court sits in Tororo town, a long journey for the

[112] Article 14 (3) (c) ICCPR *op cit*; S.Q (b) (10) Guidelines *op cit* and Article 28 (1) constitution *op cit*.
[113] These were my observations during the trial simulation and the outcome of the pre-visit and plenary discussions.
[114] Criticism over the choice of Arusha, Tanzania as the seat of the ICTR instead of Rwanda because of *inter alia* distance, are discussed in Shraga and Zacklin (1996) *op cit* 514-515. Similar arguments could be made about all trials relating to African conflict held at The Hague like that of *Prosecutor v. Charles Taylor* SCSL-03-01-PT; ongoing ICC trials of *Prosecutor v. Thomas Lubanga Dyilo* *op cit* and *Prosecutor v. Jean-Pierre Bemba Gombo* *op cit*, and the impending trial of Uganda LRA rebels.
[115] E. Mose estimates the average length of each trial has been 62 trial days *op cit* 931-932. J. Maogoto (2004) *op cit* 198 on lengthy trials as a denial of speedy justice. Although international trials involve multiple allegations of great complexity like genocide, from a traditional perspective the delays may be attributed to the fact that the tribunals hold one trial, not smaller trials as is done at the local village level.
[116] Field notes, interview with the Gwaragwara parish chief, and the Kisoko sub county chief on 14th August 2006.

villagers and the High Court sits in Mbale town, several miles away.[117] Worse still, the Court of Appeal and the Supreme Court sit only in the capital city of Kampala. This makes it difficult for the victim, relatives of both parties, as well as the community to attend the hearings if they do not live in the city or nearby town. Viewing and listening to proceedings is a huge factor in participatory justice, and failure to do so 'externalises' justice even further for the locals. These findings confirm the ISS study discussed in Chapter 5, on the unchallenged advantage of traditional courts, like location in villages. These advantages translate into procedural legitimacy for traditional courts despite legislative abolition of their criminal jurisdiction.

Having juxtaposed the traditional participatory process with international rights standards, I have demonstrated in this section that the former, by prioritising the protection of social obligations, may abridge individual rights. This is both a strength and a weakness of the system. The strength lies in its emphasis on reparation, healing and aiming to restore equilibrium.[118] The main weakness is in not ensuring that procedural equality applies to vulnerable and socially disadvantaged groups. Mitigating these weaknesses will depend in part on whether a prescriptive framework for protection of rights can be created. I address this point next.

Section 4: The role of cultural institutions in creating a prescriptive human rights framework

In this section, I make my second argument that any attempt at accommodating individual human rights is thwarted by the lack of a prescriptive framework. This is attributed to the weak position of *Nono*, a failure of *Tieng Adhola* to give guidance on the protection of procedural rights, and the inability of higher traditional courts to prescribe such a framework. These factors negatively affect the protection of procedural rights.

[117] Figure 5 in Ch. 6 *op cit* shows West Budama County in relation to Tororo Municipality. Appendix 5 shows Tororo district in relation to Mbale district. Figure 1 in Ch. 1 S.5 *op cit* shows the location of the capital city Kampala in relation to Tororo district. This gives an idea of distances between the courts.
[118] Skelton and Sekhoyane *op cit* 587. The intention of traditional justice was to restore the victim to his previous position: Nsereko (2002) *op cit* 22-23.

(i) *Nono*

The Uganda constitution prohibits traditions or customs that may violate the dignity or human rights of the person.[119] Thus it may be argued that the role of the *Nono* as the policy making organ of the clan is to ensure that trial processes are consistent with the constitution. In particular, individual procedural rights must be protected during trials. In the previous chapter, however, we saw that *Nono* has no power to determine procedures in the clan courts because each court is independent of the *Nono*. The study participants also implied that *Nono* has no obligation to protect or negatively refrain from abusing individual rights. This is because firstly *Nono* is not a state in the legal sense; and secondly, clan court autonomy prevents imposition of a uniform human rights standard on the courts.

(ii) *Tieng Adhola* and human rights

Another body that could create a prescriptive framework is the *Tieng Adhola*[120] because its mandate under Article 8.03 of its constitution is to ensure that: 'Every person in Padhola shall enjoy the fundamental human rights and freedoms of the individual as provided in the constitution of Uganda'. These rights include the individual right to a fair trial. But the legal department has neither issued any guidelines, nor provided legal oversight on a Jopadhola notion of the right to a fair trial, leaving interpretation to the vagaries of clan courts. The ability of the legal department to act in an advisory capacity is limited given the absence of an overarching human rights framework within which to anchor their legal advice. Additionally, any legal advice would be based on judicial vindication of rights[121] that may not take into account the social context. Moreover, some concepts like equality may prove difficult to give advice on because, as some argue, it is prescriptively

[119] Uganda Constitution *op cit*, Article 32 (2), as amended by the Constitution (Amendment) Act 2005 reads as follows: 'Laws, cultures, customs and traditions which are against the dignity, welfare or interest of women or any other marginalised group to which clause (1) relates or which undermine their status are prohibited by this Constitution.'

[120] *Tieng Adhola* is a cultural institution that brings together all heads of Jopadhola clans: Ch. 6 S. 5 (iv) *op cit*.

[121] A. An-Na`im, 'The Legal Protection for Human Rights in Africa: How to do more with less' in A. Sarat and T. R Kearns (eds.), *Human Rights: Concepts, Contests, Contingencies* (Michigan: University of Michigan Press, 2001) 105. Justiciability is based on seeking legal redress in a court of law.

empty since it does not specify exact standards of measurement.[122] To a greater extent, however, the verbal complaints received are of a spiritualist nature about *kidada* and witchcraft. [123] Arguably these complaints are difficult to solve using a legal approach per se.

Tieng Adhola furthermore appears to lack social legitimacy, stemming from its creation during the period of cultural revivalism in the 1990s, and not as a decision evolving from the lower level *Nono*.[124] This coupled with clan autonomy and lack of public awareness of its constitutional provisions, weakens the *Tieng Adhola's* potential to provide guidance on interpreting procedural rights in the local context. It is of interest that none of the participants mentioned *Tieng Adhola* as an institution to which they related in any way, apart from registration and getting help with drafting clan constitutions.[125] Crucially, none of the study participants drew links between Article 8.03 of the *Tieng Adhola* constitution and their court work.

(iii) The higher traditional courts

There is little evidence to show that the higher traditional courts have created a prescriptive framework for protection of rights. Study participants were sensitive to criticisms that they are not knowledgeable in national laws.[126] This may be because of their pre-occupation with preserving communitarian values and maintaining equilibrium. Even so, the rigidity of custom, coupled with the ineffectiveness of the legal department of *Tieng Adhola* has prevented progress in this direction. This is exacerbated by a judicial framework that does not recognise the clan courts very existence.

The foregoing discussion shows that the failure of the *Nono, Tieng Adhola* and higher traditional courts to create a prescriptive framework, gives a monopoly to clan courts to apply a Jopadhola notion of procedural rights in sentencing. This stifles protection of procedural rights because communitarian values perceive of rights as a

[122] T. Bennet (1995) *op cit* 89.
[123] Interview with *Kwar Adhola op cit. Kidada* is a swelling of the stomach believed to be caused by casting a spell through witchcraft using *sikoko*- sharp razor-like implements that are put in the stomach.
[124] The lack of awareness of the *Tieng Adhola* institution among rural folk in Padhola is a fact acknowledged by the *Kwar Adhola*: interviews *op cit*.
[125] The *Tieng Adhola* cabinet holds meetings with the clan leaders to exhort them to draft clan constitutions under the guidance of the legal department.
[126] Plenary discussion, *op cit*.

protection for *all* people. The clan court's consistency on this can be attributed to their reliance on precedent, a matter explored in section 5 below.

Section 5: Applying the doctrine of precedent

In this section, I explore the reason why clan courts are consistent in their protection of a communitarian notion of human rights. This is because they apply a traditional notion of 'precedent' that underscores protection of communitarian values. Clan court officials refer to earlier decided cases and in delivering their judgement, reiterate societal norms. Their practices have similarities with the international approach to precedent.

The JLOS Criminal Justice Baseline survey[127] makes no reference to any jurisprudence from kinship courts. I was also unable to get statistical figures to establish the volume of work handled by clan courts. Based on responses I received, I conclude that their workload is substantial enough to warrant an examination of whether they apply some sort of precedent. Still, it is difficult to discern the reasoning behind the verdicts and sentencing tariffs, particularly among the Jo-Gem who use oral jurisprudence and seem not to keep court records. Although Jo-Gem clan assert that written court records in Dhupadhola have been kept from 2004, no such documents were available for scrutiny. In any case, some Jo-Gem members were strongly in favour of retaining oral jurisprudence arguing that decisions are arrived at after consensus so there is no need for written records. In any case, records are left with whichever party won the case and not the court.[128]

The available court transcripts[129] such as those of the *Odoi* case of Namwaya Saza court are not conclusive evidence that documentation is a widespread practice, and it appears to have been adopted recently. However, the transcripts are 'inaccessible' both physically[130] and figuratively, because assumptions cannot be made about what is *not* documented. For example, there is no mention of protection

[127] JLOS (2002) survey discussed in Ch.1 S. 3, *op cit.*

[128] Mr. C. O a Jo-Gem elder strenuously argued that written records do not add value to the proceedings and are unnecessary.

[129] There were four judgements: 1 on land and 3 criminal cases. Judgments were in Dhupadhola with some translations in English.

[130] During the plenary discussion, I requested all the study participants to avail me copies of their decisions over the past 3-5 years. I followed this up with telephone calls and e-mail correspondence to my assistants during July –August 2007, February-March 2008 and a field visit in August 2008, but to no avail.

of individual rights, yet this appears to take place during the trial. Rather, the truncated transcripts are the secretary's observations of proceedings, based on assumptions that the reader knows the clan laws, processes and societal norms.

These transcripts do however show that sanction of immoral behaviour is based on *previously* decided local cases: a 'stare decisis' of sorts. Take the example of the *Odoi* case:

> 'Mr Okongo M also got up and gave education touching on the laws of the clan while saying that in those early days we had O. Ojwali and his lorry. We said those girls who stayed with relatives should be chased out that day.
> The Miluka of Kidera gave an example how sometime back a girl was chased away who was a relative who was married at his home. This was the daughter of Obbo B. who is a Morwa.'[131]

Here, the 'precedent' cited are the cases of *Ojwali* and *Obbo* where the clan court decided that girls who live in sexual relationships with men of the same clan should be sent back to their parent's home. Precedent is reinforced with teaching (*fuonji*) of norms and folk wisdom[132] of the evil that befalls those who do not comply:

> 'Mr. Owor O Odaka also brought *fuonji* by saying that when Okecho the Gombolola, son of Y. Okello and the daughter of Ongwada took the case up to the Government but there were no blessings at all that they ever received.'[133]

The message here is that misfortune comes about to those who disregard traditional processes. Such 'lesson' appears to be irreconcilable with the principle of choice that permits one to opt out of clan law, and seek review from the courts of law. Then again, *fuonji* as applied through precedent uses a pragmatic approach to justice as conceived in social norms, of which the clan officials themselves are a part. Ultimately, *fuonji* is a process by which the officials reinforce adherence to communal norms and protect communitarian values, exhorted through spiritualism. Clan courts may not always protect procedural rights because of a strict adherence to precedent, but their approach is similar to the ICC's discretionary approach to precedent and the use of expressivism as an educational function about the aims of international criminal justice.

[131] Transcript *op cit* paras. 10,17.
[132] An account of precedent and 'judicial homilies' in pre-colonial Africa by T. Elias, is discussed in Ch.2 S.2 (i) *op cit.*
[133] Transcript *op cit* para 11.

Section 6: Conclusion

I have shown informal ways in which clan courts integrate national law with the Jopadhola notion of procedural rights. My argument was based on two main points. Firstly, that applying a participatory approach to the Jopadhola notion of procedural rights may circumscribe individual rights thereby creating a conflict with international law. The second point is that this conflict arises in part from the lack of a prescriptive human rights framework from traditional justice institutions and in part from adherence to precedent by clan courts.

The Jopadhola notion of human rights reflects how internal cultural discourse struggles to establish enlightened interpretations of cultural norms. The enlightened interpretations evolve from legal and political developments nationally, that force the clan to reproduce new normative frameworks. In some respects, in the Jopadhola courts, procedural safeguards are not merely routine or mundane. Rather, they are based on a reciprocal approach that combines procedural equality of arms with the principle of group rights and social fairness.

Nonetheless, there is evidence of an abridgement of individual rights, like the right to legal representation, in preference for social responsibilities. The problem is compounded by mandatory rituals like purification from which there is no right of appeal. Parochialism results in lopsided procedural equality favouring the victim and the community. This in turn reinforces a patriarchal environment that does not give absolute equality before the courts to women and youth. There are also challenges like the little knowledge of national laws, lack of training in national procedural law and other problems of a practical nature.[134]

I maintain that clan courts have not altogether failed to apply procedural rights; rather they have done it through an expanded construct of human rights as an entitlement of *all* people (conceived, at least in part, in group terms) not just an individual. This has proved Skelton and Sekhoyane's arguments correct. They posit that a human rights framework should be set by a democratic participatory process

[134] Study participants gave examples of courts sometimes sitting under trees at the mercy of the elements and the lack of reliable transportation for the court officials.

where the community develops its own principles to protect human rights.[135] This process is hampered by the absence of a prescriptive framework for procedural rights by the *Nono, Tieng Adhola* and higher traditional courts. This stems partly from clan court autonomy and partly from a lack of guidance from the legal department of the *Tieng Adhola*. Additionally, adherence to precedent by clan courts excludes judgments from courts of law and vice versa. Still, the Jopadhola notion of procedural rights permits individuals to exercise their freedom, autonomy and rational choice during deliberation of sentence, evidenced by the fact that achieving consensus is not always possible in these courts.

Following this analysis, the remaining question is whether the state could give guidance to the ICC on how to apply an expanded construct of rights within an international sentencing framework. I answer this question through an examination of Uganda's attempts at accommodating communitarian values and a traditional participatory approach in its sentencing framework in the next chapter.

[135] A. Skelton and M. Sekhonyane, *op cit* 591. They base their argument on J. Braithwaite's proposal for the need for standards in restorative justice, though not one imposed by the state.

CHAPTER EIGHT: NATIONAL SENTENCING PRACTICE: LESSONS ON INTEGRATING TRADITIONAL NORMS

Section 1: Introduction

The study findings in the previous chapter show how Jo-Gem and Morwa Guma clan courts translate 'law out of context'.[1] The courts produce a specific procedural language of rights that views a right as an entitlement of *all* people not just an individual. This chapter examines the approach of the state to accommodating a traditional normative framework using an expanded notion of procedural rights. The paucity of research on this question can be explained by the researchers' focus in Uganda on the dichotomy between the traditional and international systems. Such conceptualisation limits their appreciation of the possibility of reconciling these two systems within a legal context.[2]

State practice provides a salutary lesson for the ICC on the vexed question of integrating traditional procedural norms. The ICC is obliged to apply principles of national law that conform to internationally recognised human rights law,[3] therefore it ought to consider what the national sentencing framework, case law and the Bill of Rights have to offer. In theory, all three sources of law ought to provide sufficient guidance on a pluralist interpretation: one by which international due process guarantees are melded with a traditional notion of rights based on communitarian values.[4]

I argue that such guidance may not be easily forthcoming because even at the national level, it is problematic for courts of law to underpin reconciliation of divergent sentencing paradigms using a pluralist interpretation of procedural rights. This arises firstly because Uganda's sentencing reforms are built on the adversarial model. Secondly, normative rigidity in the Bill of Rights circumscribes communitarian values. Thirdly, the uncritical application of judicial precedent may not be conducive to a

[1] The local community following transplantation of alien laws on their system, reproduce what they consider to be 'their' normative system in decision making: F. Benda- Beckman *op cit* 29.
[2] As I have argued in Ch 3 S. 2 and 3 *op cit*, contemporary studies in Uganda focus on local council courts, while those on clan courts in Acoli do not address the question of synthesis of divergent models.
[3] Rome Statute *op cit* Article 21 (1) (c) and (3) discussed in detail in Ch.2 S. 3 (v) (c) *op cit*.
[4] Communitarian values are duty to kin, restitution, reconciliation and the role of ritual defined in Ch.1 S.4 *op cit*.

pluralistic interpretation of procedural rights. In conclusion, I suggest that there is need for a theoretical model within which the ICC could apply an expanded notion of procedural rights if it is to achieve legitimate, culturally appropriate sentencing outcomes.

Following this introduction, I examine Uganda's sentencing reforms (Section 2). Next is a historical account of Uganda's Bill of Rights, (Section 3) followed by a critique of procedural rights in sentencing based on the constitutional interpretation of Article 126 (1) by the superior courts (Section 4). Finally, I offer a brief conclusion (Section 5).

Section 2: Uganda's Sentencing Reforms

I make the first part of my argument in this section, on the cultural inappropriateness of Uganda's sentencing reforms. Although hostility to traditional forms of justice now seems set to change, the 2003 reforms are built on the preponderance of sole judicial discretion and a retributive sentencing philosophy, originating from the inherited English adversarial model. Ultimately, there is limited scope for customary law with even less room to accommodate a traditional notion of human rights.

We saw in Chapter 1 that in 2003, the Uganda Law Reform Commission (ULRC) undertook a study on the reform of sentencing legislation.[5] Using an empirical study, ULRC gathered views from all over Uganda on the sentencing process in national courts.[6] Since the ULRC report has been handed over to the Chief Justice for further action,[7] my comments are restricted to the draft recommendations on clan courts and their role in the sentencing process.

From the outset, the report observes that best practices should be borrowed from 'pre-colonial' methods of sentencing to develop sentencing policy and guidelines.[8] This erroneously assumes a static traditional law that is not subject to change. Be that as it may, the study established that clan courts are regarded as functional in rural areas

[5] *Draft Study Report of the Laws on Sentencing* (2006) *op cit* discussed in Ch.1 S. 3 *op cit*.
[6] *Ibid*, Chapter 3 describes the methodology, namely the use of interviews and focus group discussions and Chapter 4 presents the findings of the empirical study.
[7] Interview with the Chief Justice on 25th August 2006. At the time he said that the judiciary would set up a committee to study the report and make recommendations on sentencing guidelines.
[8] *Draft Study Report op cit* 27.

because their sentencing procedures are more accessible, informal, conciliatory and expeditious, compared with national courts. ULRC recommends that the state should renew and strengthen the role of clan courts in the administration of justice in Uganda.[9]

From this recommendation, it is not clear how the role of clan courts can be strengthened. Firstly, in terms of Article 126(1) of the constitution on which the recommendation was grounded, the focus in the report is on promoting discussions between the judiciary and the people, to enable communities participate in the administration of justice.[10] No mention is made of the sentencing process. Secondly, there is no discussion on how traditional processes could be used to develop sentencing policy. That these issues were not addressed is surprising, given the functions of the ULRC to integrate the local with international and national laws, and its own undertaking to borrow from traditional law.[11] Arguably this reflects the pervasiveness of the common law, adversarial model.

On the question of how the sentencing process could be modified, respondents recommend that in both the High Court and Magistrates' courts, the victim and any aggrieved party should say something before sentence.[12] Despite these laudable recommendations, the reforms fail to identify areas of convergence with traditional restorative approaches on which such recommendations could be anchored. This stems partly from the inelastic objectives of the study that excluded restorative justice. As a result, there is no reference in the report to communitarian values.

Likewise, there is no mention of the United Nations *Basic Principles on the use of Restorative Justice Programmes in Criminal Matters* [13](hereafter 'the

[9] *Ibid*, 109-111.
[10] *Ibid*, 134. The text of Article 126(1) of the constitution is discussed in S. 3 (ii) *infra*.
[11] *Ibid*, 27. S. 10 (b) of the Uganda Law Reform Commission Act, Cap 25 provides that the ULRC shall emphasise the 'reflection in the laws of Uganda of the customs, values and norms of society' consistent with the UN Charter and African Charter *op cit*.
[12] *Ibid*, 136-137.
[13] E/CN.15/2002/5/Add.1. The development and case-by-case commentary on the Principles is undertaken by D. Van Ness 'Proposed Basic Principles on the use of restorative justice: Recognising the aims and limits of restorative justice' in A. Von Hirsch et al (eds.) (2003) *op cit*. 'Soft law' standard setting began with the *Vienna Declaration on Crime and Justice: Meeting the Challenges of the 21st Century* passed by the 10th UN Congress on the Prevention of Crime and Treatment of Offenders (10-17 April 2000). The Declaration encouraged states to develop restorative justice policies, procedure and programmes that respect rights, interests of victims, offenders and communities: A/CONF. 184/4/Rev.3, para 29. An Expert group then developed principles on restorative justice. In August 2002, the UN Economic and Social Council adopted ECOSOC Resolution 2002/12 on the Principles. The UN Commission on Crime Prevention and Criminal Justice then passed *The Bangkok Declaration - Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice* at the 11th UN Congress on the Prevention of Crime and Treatment of Offenders, Bangkok 18-25 April 2005. The *Declaration* encourages member states to draw on the Principles: para 32.

Principles'). The Principles set out instances where national legal systems may apply restorative justice on a voluntary basis. Restorative justice processes should be available at all stages of the criminal justice process and may only be used with the voluntary consent of the parties.[14] More importantly, the Principles set out procedural safeguards namely: the right to legal advice before and after the process; parties must be informed of their right; nature of the process and consequences of their decision; and no unfair means may be used to induce participation of victim or offender.[15]

The Principles have nonetheless been criticised because they do not provide how restorative justice should be applied locally or globally, given the fact that there are different ways of deploying them.[16] Even so, the Principles are aimed at encouraging states to draw on them in applying restorative justice in their domestic jurisdictions. The ULRC report makes no mention of how these Principles may be applied to accommodate traditional restorative process *and* protect the right to a fair trial. Still, there are dangers in leaving the development of restorative justice to the state, for as Skelton and Sekhonyane correctly argue, it encourages a narrow construct of rights within the state's due process framework. Then individual rights would be as narrow as to only meet the needs of the criminal justice trial.[17] This means that restorative justice programmes could theoretically exclude communitarian values - the bedrock of traditional restorative justice.

Another outstanding problem is the absence of a theoretical model on which the ULRC study was grounded. During the first discussion of the report at a workshop for stakeholders, only one academic was invited.[18] Not surprisingly, the report was criticised by participants for being too theoretical because it did not, in their view, refer sufficiently to court cases,[19] not because it had a solid theoretical background. The recommendations then dealt with doctrinal and practical issues like judicial discretion in sentencing and the inclusion of sentencing topics in university law syllabi. The recommendations did not touch on the subject of integrating traditional law.[20] Since the

[14] The Principles *op cit* s. II 6, 7.
[15] *Ibid*, S. III 12 (a) (b) (c).
[16] M. Findlay and R. Henham (2005) *op cit* 306.
[17] A. Skelton and M. Sekhonyane *op cit* 591, 593.
[18] *The study for the reform of sentencing legislation*, Workshop Report (Speke Resort, Munyonyo Uganda, 27th-29th August 2003). The participants were mainly judges, magistrates, prison officers, lawyers. The only academic was Mr. E. Kasimbazi (the Assistant Dean, School of Law, Makerere University).
[19] *Draft Study Report op cit* part 6 (e).
[20] *Ibid* part 7 (a)-(r) on the Recommendations.

final report has not been widely circulated for public scrutiny, there is a lack of academic debate on the theoretical issues in peer review journals. This in turn has culminated in a paucity of academic scholarship on Uganda's sentencing reform.

ULRC's report has endeavoured to uphold Uganda's international obligations while struggling to find a place for clan courts. Nonetheless, an opportunity was squandered to make communitarian values and procedural rights a foundation for procedural reform. This reflects the tendency for public bodies to remain within judicially accepted parameters of procedural justice, rather than venture into the 'new' area of traditional restorative justice. It is a matter of conjecture whether the proposed sentencing guidelines will guide the application of traditional and international human rights norms in sentencing.[21] In expounding the problems raised above, I now address issues the ICC ought to consider if its sentencing practice is to have local legitimacy. The first is how the adversarial model marginalises clan court processes in the sentencing framework.

(i) Sentencing procedure – an 'alien' framework

The pervasive common law-adversarial model militates against adaptation of clan court processes. This is exemplified in the sentencing framework of the Trial on Indictments Act (TIA) on which, as we saw in Chapter 3, Uganda's ICC 2006 Bill is modelled. The failure of the TIA to apply a traditional participatory approach arises from sole judicial discretion in decision making.

The TIA provides for a single transaction in which both the conviction and sentence are delivered.[22] Under Section 94, if an offender is convicted or pleads guilty, the judge shall ask if the offender has anything to say as to why sentence should not be passed upon them according to the law. Omitting to say anything, however, has no effect on the validity of the proceedings. Under Section 98, the court before passing any sentence other than a *death* sentence may:

> 'Make such inquiries as it thinks fit in order to inform itself as to the proper sentence to be passed and may inquire into the character and antecedents of

[21] The Chief Justice announced that sentencing guidelines were being developed to make sentencing consistent: *New Vision* 10th December 2008.

[22] Trials are heard by a single judge assisted by two assessors. Following closure of the defence case, both prosecution and defence lawyers make submissions. The judge then sums up the law and evidence to the assessors and requests their opinion, although this when given, is not binding on the judge. The judge retires to consider the verdict: TIA *op cit* S. 82 (1)-(3).

> the accused person and may take into consideration either at the request of the prosecution or the accused person (…) such character and antecedents including any other offences admitted by him or her whether or not he or she has been convicted of such offences (…).'

In making these inquiries, the prosecution addresses the court on aggravating factors but is not permitted to propose a sentence. The defendant may make a submission in mitigation, except in cases attracting a mandatory sentence of death where the judge has no discretion in sentencing.[23] In other cases, the defendant is availed an opportunity to reply to the prosecutor's prayer although the court may ignore the offender's reply in the absence of legal proof: Section 98 (a). Previous convictions, offences admitted and past history may be taken into account during sentencing: Section 98 (b). The court's enquiries are not based on social inquiry reports such as those prepared by a professional social worker under the Children Act[24] or the Community Service Regulations.[25] Further, the TIA lacks a reparations sentencing hearing in which the views of the offender, victims and interested parties could be heard, unlike Article 76 (3) of the Rome Statute.

The judge alone determines the sentence in private. Although the judgement (containing points for determination and the reasons) is delivered in public,[26] deliberation of sentence under Section 82 is not open to public scrutiny or debate. This sole judicial discretion was considered in *Agaba Job v Uganda* where the Court of Appeal held that sentencing power is exercised when the *judge* takes into account aggravating and mitigating circumstances.[27]

Even in the Court of Appeal and Supreme Court where procedural equality exists (because legal aid is always available for all criminal cases), the parties and community do not participate in the review of the sentence. Only lawyers for the

[23] For instance, in *Uganda v Obua Dennis* alias *Amoki Milton* High Court Criminal Session No. 30 of 2001, the judge pronounced the sentence of death as the only one prescribed by the law: judgment of 9th April 2001 at 9. *Obua's* appeal was rejected by the Court of Appeal (*Obua Dennis* alias *Amoki Milton v Uganda* Cr. App 36 /2001) and is pending a hearing in the Supreme Court.

[24] Children Act Cap 59 *op cit*. Under S. 95 (1) court shall take into account the report by a probation and social welfare officer before passing sentence. S. 95(2): the report shall include, among others, the child's social background.

[25] The Community Service Regulations SI-55 of 2001 made under the Community Service Act Cap 115. Guidelines Part A s. 2 provides that a pre-sentence report should give the court a clear appraisal of the offender's situation.

[26] TIA S. 86 (1), *op cit*. An in-depth account of the steps followed by the judge in assessing sentence is given in F. Ayume *Criminal Procedure and Law in Uganda* (Nairobi: Longman Kenya Ltd, 1986) 153-160. A more recent account is given by B. J. Odoki 'Reforming the Sentencing System in Uganda' (2003) 1 (1) *The Uganda Living Law Journal* 1-22, 3-6.

[27] *Agaba Job v Uganda* C. A Cr. App No.230 of 2003 (unreported) citing *James s/o Yoram v R* (1951) EACA 18. Emphasis is mine.

prosecution or the appellant make representations (submissions) on behalf of the victim and appellant. The judges analyse evidence on record only. They are reluctant to admit fresh evidence on the grounds that their role as an appellate court is to review evidence only: *Pandya v Republic* and *Kifamunte v Uganda*.[28] The judgment and sentence of the appellate courts are likewise deliberated in private and the judgment delivered in public.

The foregoing discussion shows that judicial control of deliberation and review of sentence is similar to that of the ICC discussed in Chapter 2. Such a procedure, dominated by a retributive ideology, does not engage parties or the victim community and therefore does not encourage transparency.[29] I now turn to the retributive philosophy as the second issue for consideration.

(ii) Retributive sentencing philosophy

M. Langer's study shows that the state is the point of translation of structures and legal ideas. This means judges and law reformers are better placed to translate local traditional structures and values into national structures. I argue that judges fail to do so because they lack a sentencing policy to guide the application of the traditional restorative process and communitarian values. What exists is a patchwork of sentencing principles grounded in a predominantly retributive philosophy. Yet explicit penal objectives could help in the process of structuring and applying sentences that are culturally appropriate. Although it remains unclear under the Rome Statute what role national sentencing practice could play when the ICC determines sentence,[30] it is imperative that we examine Uganda's sentencing principles to see what guidance could be elicited from them.

At the outset, there is no statutory provision setting out the purpose and principles of sentencing.[31] Whatever principles exist is found in case law. In *Uganda v Eliba,* the High Court held that the sentence should be in proportion to gravity of the

[28] *Pandya v Republic* [1957] EALR 200 and *Kifamunte Henry v Uganda* Sup. Ct. Cr. App. 1 of 1987. The appellate courts have powers to order production of evidence or summon witnesses. Still, the judges interpret their powers restrictively except in rare circumstances, for instance, where despite due diligence the evidence could not be adduced at the trial.
[29] These criticisms are made by R. Henham (2003) (2004) (2005) *op cit* discussed in Ch. 2 S. 3 *op cit*.
[30] M. Drumbl *op cit* at 52.
[31] Noted in *A study on sentencing and offences legislation in Uganda,* Report 5 (JLOS, Kampala, 2001) page 1 and paras 55.2.3 and 56.2. Available at http://www.commonlii.org/ug/other/UGJLOS/list.html, visited on 4/02/2009.

offence. Where there are mitigating factors, the sentence should reflect 'the justice of the case'.[32] Also in *Wanaba v Uganda*, the Court of Appeal held that there is need for the court 'always to tailor the sentence to fit the crime', thereby applying a just deserts theory.[33] Where a wrong principle of sentencing is applied, the appellate court can 'cure' the irregularity.[34] Significantly, the guidance in the jurisprudence excludes a participatory notion of justice: making no reference to the social roles of the victim, offender, their kin and the community in the determination or review of sentence. Accordingly, the existing sentencing principles are based on retribution and deterrence. Rehabilitation only applies where the verdict is guilty but insane, institutionalises the healing of the individual[35] but without addressing their reintegration in the community. Paradoxically, these sentencing principles aimed at protecting the public from an individual[36] do not take into account communitarian values.

In sum, there are no national sentencing guidelines on the application of traditional restorative justice in sentencing on which the ICC may rely. Pervasive judicial control and retributive philosophy: areas not covered in the sentencing reforms, originate from the inherited English adversarial model from which Uganda's procedural framework evolved. I turn to this next.

(iii) Historical background to the procedural framework

Uganda's penal system was imported from England in the 18th century, with the political aim of subjugating the local people through divide and rule.[37] The main features of the system were retributive punishments and an adversarial procedural framework based on the old English Assize courts.[38] The present system retains the common law framework, in what Drumbl aptly describes as the outcome of old

[32] *Uganda v Eliba* [1978] HCB 273 paras 7 and 8. The holdings are reproduced in A. Tumwebaze *Criminal Proceedings* (Barrister's Reference Book series CGCU: Kampala, 2007)162-163.
[33] *Yunus Wanaba v Uganda* [2001-2005] HCB 25, 26 para 3. S. Beresford *op cit* at 40-41 gives a concise description of the just deserts theory as retributive, though he points out that modern theorists like A. Von Hirsch (1976) call for proportionality and objectively fair punishment.
[34] *Meri Moses v Uganda* Criminal Appeal No.59 of 2004 (Court of Appeal) para 20-30, page 4.
[35] For instance, TIA *op cit* S.48.
[36] B. J Odoki *op cit* 1-5. S. Birungi, *The Law Governing Sentencing and Punishment in Uganda: a Case for Reform*, Unpublished LLB Thesis, Makerere University, Uganda (1998) especially Chapter 3, 60-69. An overview of Uganda's sentencing legislation is in Appendix 9.
[37] E. Beyaraza (2001) *op cit* at 119.
[38] Ch. 1 and 6 *op cit*. H. Morris and J. Read (1966) *op cit* 264.

repeated processes of transplants that occurred throughout history, coinciding with colonialism.[39]

As we saw in Chapter 6, Uganda's sentencing laws originated from the introduction of the Indian Code of Criminal Procedure of 1898 brought in force by the 1902 Order-in-Council: Section 15 (2). The Code introduced English rules of procedure based on principles of natural justice. The Code was replaced by the Criminal Procedure Ordinance 25 of 1919. In a major redrafting in 1930, the colonial office prepared a standard Criminal Procedure Code for the colonies.[40] The procedure therein was based on that in the High Court of Justice, Courts of Oyer and Terminer and General Goal Delivery in England and followed closely that of an English assize court.[41]

This imposition of English law sounded the death knell to traditional courts, but faced stiff opposition from the local population and some Europeans. This dissatisfaction culminated in an inquiry appointed in 1933 into the administration of criminal justice under the chairmanship of H. Bushe.[42] As Mamdani observes, the Bushe Commission was set up against a backdrop of anti colonial protest, pitting lawyers against administrators. The administrators wanted speedy justice, while lawyers preferred 'transplantation of the technicalities of English criminal law and procedures'.[43] The Commission's terms of reference were to enquire into criminal procedures and practice *other* than native courts and consider whether alterations were desirable in the case of natives.[44] Effectively, traditional restorative process was omitted.

As a result, the Commission paid little consideration to complaints about the inappropriateness of the transplanted criminal procedure code. Rather, the Commission focused on the sentences only.[45] Recommendations that the state's criminal codes should be repealed in cases involving natives, and native law and custom remain as the

[39] M. Drumbl *op cit* 126-127.
[40] A detailed explanation of the evolution of the criminal procedure codes up to the 1960s is in H. Morris and J. Read *op cit* 262 -271. In Uganda it was Code No. 8 of 1930.
[41] Criminal Procedure Code No 8 *op cit*, S. 250 also discussed in Morris and Read, *op cit* 268. The main provisions were: plea taking, hearing of the prosecution case, ruling on a prima facie case, defence case, final submissions, summing up to the assessors, verdict then sentence.
[42] *Report Of The Commission Of Inquiry Into The Administration Of Justice In Kenya, Uganda And The Tanganyika Territory In Criminal Matters,* (London, HMSO, 1933).
[43] M. Mamdani *op cit* 128-129.
[44] *Report of the Commission of Inquiry op cit*, para.2.
[45] *Ibid*, para 158-160.

only code, were ignored.[46] Instead, the Commission observed that it was the duty of the government to 'civilise' and maintain order, which could only be done by introducing 'British concepts of wrong doing.'[47] Accordingly, its recommendations were that punishments from 'enlightened systems of jurisprudence' like imprisonment, corporal punishment and the death penalty, be imposed.[48] This lends credence to the criticism: "We have, rightly or wrongly, imposed upon natives of Uganda an alien system of justice. Our object in doing so was presumably to inculcate more satisfactory ideas of right and wrong."[49] In this respect, Morris and Read's observation that there was wholesale adoption of English rules of Procedure and English law by the locals is an overstatement.[50]

The Bushe Commission made no recommendations on the sentencing procedure of the Criminal Procedure Code (CPC) of 1919 so it was retained even in the subsequent edition of 1923. The CPC was redrafted in 1951. In matters of criminal procedure, a court was now guided by provisions of the CPC, itself based on English procedure and principles.[51] The sentencing procedure remained the same and was replicated in subsequent editions of the CPC.[52] The transplanted English procedure gave sole discretion to the judge to determine the sentence and protected international procedural rights for the defence like the right to a lawyer, and right to appeal.[53] Notably absent, was any reference to rights for victims or a voice for the community. This is hardly surprising given the context in which procedural reforms took place and the associated abolition of traditional customary law.

Since 1951 there have been piece-meal amendments to procedural legislation. Post independence reform of the 1970s led to the passing of the Magistrates' Courts Act (MCA) and the TIA where the drafters merely took provisions from the CPC on trials before Magistrates' courts and the High Court then put them in two separate pieces of legislation.[54] The provisions left in the CPC (now Cap 116) are mainly on appeals and revision. The 2000 Revision of the Laws of Uganda did little to change the

[46] *Ibid*, para 161,commenting on the recommendations in the Memorandum by Mr. Willis- an advocate.
[47] *Ibid*, para 162
[48] *Ibid*, paras 164-165.
[49] *Ibid*, pages 132-133 paras. 15-16 citing the then Governor of Uganda.
[50] H. Morris and J. Read, *op cit*, 256.
[51] Cap 24 *op cit* S. 12.
[52] *Ibid*, S. 290.
[53] Criminal Procedure Code Cap 107 e.g. S. 279 on examination of witnesses.
[54] The Magistrates' Courts Act 13/1970 and the Trial on Indictments Decree No. 26/1971.These laws were re-numbered in the 2000 law revision and are now the MCA Cap 16 and the TIA Cap 23.

trial procedure, particularly its sentencing provisions. These remain largely a replica of the 1923 edition,[55] devoid of any participatory approach whatsoever.

I have argued here that Uganda's procedural framework is grounded in retributive philosophy based on an antiquated piece of legislation whose common law-adversarial origins date back to the 18th century. The sentencing laws lack a process by which the community can perceive that offenders have been held accountable in a fair process. For this reason, a rule oriented approach fails to draw on the similarities with traditional restorative justice processes. Moreover, the ULRC report does not borrow from traditional restorative justice to bring it closer to communitarian values. This may be attributed to the fact that traditional criminal law does not fall under the scope of legally recognised customary law.

(iv) The scope of customary law in Uganda

We saw previously that constitutional and statutory developments by post-independence governments transferred the adjudication of criminal customary law from clan leaders to formal courts.[56] This situation has not been reversed. Firstly, under Article 28 (12) of the constitution, all penalties must be prescribed by law. This explicitly excludes traditional clan law that is largely unwritten, and whose penalties are not prescribed by law. It is for this reason that some key respondents argued that the autonomy of traditional courts be retained since they fall outside the jurisdiction of the national system.[57] There is however, some anecdotal evidence that magistrates handle decisions from the clan courts though informally. For example, the Chief Magistrate of Tororo said that he receives appeals from decisions of clan courts in civil matters relating to land allocation. The clan elders come to the court following a complaint by

[55] S. 290 of the Criminal Procedure Code Cap 24 (1923 Edition) provides:

> 'The court, before passing any sentence other than a sentence of death, may make such inquiries, as it thinks fit in order to inform itself as to the sentence proper to be passed, and may inquire into the character and antecedents of the accused person either at the request of the prosecution of the accused person and may take into consideration in assessing the proper sentence to be passed such character and antecedents including other offences committed by him whether or not he has been convicted of such offences.'

This text has been replicated in S. 98 TIA *op cit*.

[56] Ch. 6 *op cit*, s. 3 (iii) discussing the effect of S.9 (1) Magistrates Courts Act, Cap 36 (1964) *op cit*.

[57] These include: Chief Justice B. Odoki interviewed on 25/08/06, Justice C. Byamugisha and Justice C. Kitumba interviewed on 3/08/06. Prof. Joseph Kakooza, Chairman Uganda Law Reform Commission interviewed on 22/08/06 and Dr. Masamba Sita Director UNAFRI interviewed on 31/08/06, both underscored the importance of a legal system taking into account local concepts of procedural justice.

an aggrieved party to give the facts of the case. This, he pointed out, is done informally not during court hearings.[58] Even so, this does not legitimise traditional courts criminal jurisdiction.

Secondly, the jurisdiction of the High Court under Section 14 (2) (b) (ii) of the Judicature Act shall be exercised subject to any 'established and current custom or usage'. This section must be read together with Section 15 (1) under which the High Court can observe or enforce the observance of any existing custom that is not repugnant to 'natural justice, equity and good conscience' and is not incompatible with any written law. These provisions have been interpreted in *Tifu Lukwago and another*, per Mulenga JSC, to mean that custom is to be applied where the law is silent, subject to the 'repugnancy' clause.[59] However, these provisions in the Judicature Act refer to traditonal laws that were not abolished, but preserved by legislation like the customary marriage laws.[60]

As a consequence of these two factors, traditional customary procedures are treated as circumstantial evidence by national courts, as can be seen in the decision of *Dennis Obua*. The facts were that the accused, Obua, confessed to murder before a Langi ethnic clan court. Obua handed over the murder weapon (a gun) to the clan members and a written confession was recorded and signed by him and the leader of the clan chiefs.[61] The serial number of the murder weapon was also recorded. During the High Court trial, the only direct evidence adduced was that of the clan leader and clan members who were treated as witnesses for the prosecution.[62] The accused was found guilty and sentenced to death. Since the Evidence Act applies only to proceedings in courts of law, Judge Opio-Aweri rightly treated the testimony of the clan elders as overwhelming circumstantial evidence of murder.[63] He did not consider the written confession because he treated it as inadmissible since it fell outside the ambit of the

[58] Interview with Chief Magistrate of Tororo- Mr. P Rutakirwah, on 16/08/06 *op cit*.
[59] *Tifu Lukwago v S. Kizza and another, op cit*.
[60] The Customary Marriages Act, *op cit.* Customary marriages are preserved by law, thus the High Court made a declaration prohibiting marriage among members of the same clan in *Kiwuwa v Serunkuma* and *Namazzi* case *op cit* discussed in Ch. 6 S. 6 (i) *op cit.* Also magistrate's courts have jurisdiction to apply only civil customary law under S.10 MCA *op cit.* In *Tifu Lukwago op cit* the court considered the custom surrounding purchase of land under customary land tenure in Buganda.
[61] *Uganda* v *Obua D*, High Court Criminal Session No. 30 of 2001 *op cit*, 10 -19 of the transcript citing the decision of the Langi clan court.
[62] *Ibid*, 10-11, 16-19, evidence of Prosecution Witnesses No. 3, 5 and 6.
[63] *Ibid*, Judgment pages 7-8 citing principles laid down in *Teper v R* [1952] 2 All E Reports 447 followed in *Simon Musoke v R* [1958] EALR 715.

Evidence Act.[64] Similarly, the record of the serial number of the gun was also inadmissible.[65] Following summing up, the assessors gave a brief opinion, directing the court to convict the defendant since the prosecution had proved its case beyond reasonable doubt.[66] The assessors' opinion is clearly legalistic, based less on traditional criminal law and more on the burden of proof. The judge determined the sentence in accordance with national law and sentenced the accused to death. His decision was unilateral because the Assessors opinions were not binding on him. This contrasts clan court procedure discussed in Chapter 7, where the assessors' opinion is central to the verdict and their participation key to the determination of sentence.

Clearly, Uganda's legislation has a limited scope of customary criminal law. This follows a continuum of restrictive statutory and constitutional provisions that continue to subordinate traditional clan laws, leaving traditional participatory process on the fringes of national sentencing law. By not taking into account clan court sentencing practice, the law has no interactive characteristics (like public deliberation of evidence and sentence) equivalent to the traditional participatory process. The sentencing reforms lack effective procedural safeguards during sentencing and make no reference to the Principles. Besides, there are no provisions on the duty of kin, obligatory reconciliation feasts or purification rituals of the kind that are mandatory in clan courts. Against this backdrop, I now undertake an examination of the right to a fair trial in Uganda's Bill of Rights to explain this lack of traditional procedural safeguards.

Section 3: Development of the Bill of rights

In this section, I make the second part of my argument that the Uganda Bill of Rights reflects normative rigidity as a result of a 'copy and paste' of human rights provisions transplanted from the ECHR. The absence of communitarian values arises from historical and political events in the country that also shaped the constitution. Ultimately, the Bill reflects international human rights norms, but fails to act as a normative bridge between individual procedural rights and communitarian values.

[64] *Ibid*, transcript page 11: evidence of Prosecution Witness 3. S.23-27 Evidence Act *op cit* provides that only a confession recorded by police officers or magistrates is admissible. *F. Asenwa and D. Kakooza v Uganda* S. C. Criminal Appeal 1 of 1998 confirmed the rules on recording of confessions.
[65] *Obua op cit*, transcript, 16-17.
[66] *Ibid*, 36.

(i) Locating communitarian values in the constitution

Difficulties inherent in the application of human rights norms in culturally diverse societies, such as are found in Uganda, are recognised in the *Vienna Declaration and Programme of Action*:

> 'While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of the States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.'[67]

This paragraph puts the onus on Uganda to protect human rights within an overarching framework. Uganda's constitution takes into account cultural interests but lacks a positive statement on communitarian values because it is *not* premised on cultural values. What exists under Article 37 is recognition of cultural institutions and protection of the individual's right to practice their culture:

Article 37:

> 'Every person has a right as applicable, to belong to, enjoy, practice, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others.'

Article 37 incorporates the text of the UDHR,[68] ICCPR,[69] ICESCR,[70] and also adopts the wording of Article 17 (2) of the African Charter on Human and Peoples' Rights (hereafter' African Charter') in which 'every individual may take part in the cultural life of his community.' Article 17 (3) of the African Charter states categorically that the state as duty bearer must promote and protect traditional values recognised by communities. Under the Cultural Objectives in Uganda's constitution, the state is also obliged to promote and preserve cultural values and practices that promote the dignity and well being of Ugandans.[71] Duties of the citizen as set out in the National Objectives are largely political, but mention vaguely 'contribution to the well being of the

[67] *Vienna Declaration and Programme of Action*: United Nations General Assembly, UN Doc, A/CONF.157/23, 12 July 1993: para 5.
[68] 'Every one has the right to freely participate in the cultural life of the community (…)': Article 27 UDHR *op cit*.
[69] Article 27 ICCPR *op cit*: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'.
[70] Article 15 (a) ICESCR *op cit*: State parties recognise every person's right 'to take part in cultural life.'
[71] Uganda constitution *op cit*, National Objectives and Directive Principles of State Policy: Cultural Objective (XXIV) (a).

community'.[72] Still, these constitutional objectives lack the clout of positive rights to be protected by the state.

The state has also developed a National Cultural Policy to define cultural beliefs, traditions and values. Traditional institutions are defined therein as inclusive of clans, kingdoms, chiefdoms, and the family[73] and are protected by Article 246 of the constitution that recognises kings, traditional or cultural leaders.[74] The Policy creates a framework to proscribe customs and traditions that infringe on human dignity and promote those that enhance it.[75] To this end, the Ministry of Justice is tasked with initiating, drafting and revision of laws,[76] although this is yet to happen.

Despite constitutional and government recognition, Articles 37 and 246 of the constitution do not recognise the application of traditional criminal law by such cultural institutions for the reasons examined previously. Firstly, clan courts were abolished during post independence and their structures and procedures were rendered redundant.[77] Additionally, Article 28(12) prohibits unwritten penal offences and punishments that include oral traditional laws. Finally, Article 37 does not grant absolute rights. The state can pass laws that derogate from this right.[78]

In my view, Article 37 and the constitutional objectives do not go far enough to accommodate communitarian values or an African notion of procedural fairness. In particular, these provisions do not relate to articles in the African Charter (like the individual's duty to the community) nor do they ensure that individual rights are not subordinated to community interests. Yet Uganda has signed and ratified the African

[72] *Ibid*, Duties of a Citizen Objective (XXIX) (c).
[73] National Cultural Policy, Ministry of Gender, Labour and Social Development, December 2006: paras 2.2.5 and 2.4.1.
[74] Article 246 (6) constitution *op cit*, recognises such king, traditional or cultural leader: 'who derives allegiance from the fact of birth or descent in accordance with the customs, traditions, usage or consent of the people (…).'
[75] Cultural Policy *op cit*, 7.4. The text reads 'mitigate' but no explanation is offered as to what this entails.
[76] *Ibid*, 8.1. A law to guide communities seeking to have cultural leadership is in the offing- State Minister for Culture and Gender, Ms. R. Nakadama cited in *Daily Monitor* 12th January 2009.
[77] Discussed in Ch. 1 and Ch. 6 *op cit*. I argue in Ch. 5 *op cit* that the definition of traditional courts in Section S (1) of the Guidelines that expound the African Charter, appear to exclude traditional courts not legally recognised by the state.
[78] The state can in public interest, limit rights and freedoms of individuals under Article 43. The rights and freedoms from which derogation is prohibited under Article 44 are: freedom from torture, cruel, inhuman and degrading treatment; freedom from slavery or servitude; the right to a fair hearing and the right to an order of habeas corpus. This point is discussed in some detail by M. Senyonjo (2002) *op cit* 473-474.

Charter.[79] Besides, under the Vienna Convention on the Law of Treaties is the principle of *pacta sunt servanda*: 'Every treaty in force is binding upon the parties to it and must be performed in good faith'.[80] It follows that Uganda as a signatory to the Vienna Convention has an obligation to enforce all international treaties it has ratified, including the African Charter.[81] This is because rights in these international instruments are not 'mere platitudes' but binding obligations that must be protected by Uganda's national courts.[82]

Article 45 appears to plug the gaps in Article 37 by providing that rights and duties 'shall not be regarded as excluding others not specifically mentioned.' It has been convincingly argued that all rights in the UDHR that are guaranteed under the ICCPR are part of the Bill of Rights in the Uganda constitution.[83] The same argument could be extended to duties of the individual, traditional and communal values, as set out in the African Charter and the Principles. That the Bill of Rights makes no explicit reference to the African Charter provisions; arises from the historical and political events that shaped the constitution.

(ii) Evolution of the Bill of Rights

In the period leading up to independence (1894–1962), Uganda as a British Protectorate was characterised by lack of protection of human rights. There was no formal bill of rights because the colonial administration usurped the power of indigenous people to define their own rights and interests.[84] The administration developed instead a political system that catered for Britain's economic needs while accommodating local interests that they felt needed recognition.[85] These interests were

[79] Date of ratification was the 10/05/1986, deposit of the instrument was the 27/05/1986 and date of signature was 18/08/1986: http://www.achpr.org (visited 6/11/2007).
[80] Vienna Convention, on the Law of Treaties, UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969) Article 26. Uganda acceded to the Convention on the 24th June 1988. Source: http://ozone.unep.org/Ratfication_status_ratif_by_treaty.shtml?treaty=VC, last visited on 28/04/2008.
[81] For instance, Uganda acceded to the ICCPR on 21 June 1995 and to the ICESCR on 21 January 1987.
[82] P. M Walubiri, 'An analysis of international human rights instruments and their relevance to a liberalised independent judiciary' in P. M Walubiri (ed.), *Uganda: Constitutionalism at the Cross roads* (Uganda Law Watch: Kampala, 1998) 96.
[83] M. Senyonjo (2002) *op cit* 460.
[84] *Ibid*, 447-448. G. Kanyeihamba (2002) *op cit* Ch. 1 and 2 *op cit*, for an excellent account of these events.
[85] D. W Nabudere, 'Politics And Constitution Making in Post Colonial Uganda' (2004) 2 (1) *Uganda Living Law Journal* 1-30, 1-2. Also J. C Mubangizi, 'The Protection of Human Rights Awareness in

mainly those of the Buganda Kingdom, leading to what Nabudere calls a 'mixed' independence constitution. In it, federalism and unitary elements were brought together causing lasting problems.[86]

Uganda achieved independence on 9th October 1962. The 1962 Independence constitution declaring Uganda independent from Britain was annexed to the Independence Act that was passed by the British Parliament.[87] This followed protracted negotiations between Britain and local nationalist politicians.[88] The London constitutional conference drafted this independence constitution, and included in it a chapter containing human rights and freedoms.[89] The Bill of Rights contained therein was based on the Nigerian Bill of Rights that in turn was modelled on the ECHR.[90] For instance, the right to fair trial in Article 24 (2) protected due process guarantees to legal representation.[91] The constitution also defined powers of the three organs of government: the legislature, executive and judiciary.[92] There was no mention of economic, social and cultural rights because the drafters were the same colonial authorities that were insensitive to cultural rights of the indigenous Ugandans.[93] Significantly, the transplanted ECHR human rights provisions were modelled for industrialised nations that shared a common heritage, similar understanding of rights and had centrally governed liberalised democracies.

To cater for Buganda's interests, the constitution guaranteed the retention of customary authority though it granted a superior status to Buganda. This is because, as we saw in Chapter 6, it was through Buganda kingdom that the British protectorate was established and gradually spread to the rest of Uganda. The King of Buganda was President and head of state and he appointed the Prime Minister who was leader of the

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Uganda: Public awareness and perceptions' (2005) 3 (1) *African Journal of Legal Studies* 166-186, 169; M. Senyonjo *op cit* 448.

[86] D. Nabudere *op cit*, 2.

[87] 10 &11Eliz.2.c.57 passed by the Imperial Parliament in August 1962.

[88] J. Oloka-Onyango (1995) *op cit*, 157.

[89] Colonial Office, *Report of the Uganda Constitutional Conference*, HMSO London, 1961, Cmnd 1523, 29.

[90] H. Morris and J. Read *op cit* 76 and 169; M. Senyonjo *op cit* 449-450 (note 26) citing B. O Nwabueze, *Constitutional Law of Nigeria*, (1964). The ECHR (1950) *op cit* was drafted by the British Foreign Office and was built, among others, on individual human rights principles. A comprehensive overview of normative considerations, negotiations and drafting history of the ECHR is in S. Greer (2006) *op cit* 15-20.

[91] 1962 constitution, *op cit* Article 24 (2) (a-f). Other rights included: the right to life, liberty, prohibition from torture, grave and inhuman treatment (Articles 18, 19 and 21) that drew from the ECHR *op cit* Article 2(1) on life, Article 5 on liberty and Article 3 on prohibition of torture, inhuman or degrading treatment.

[92] 1962 constitution *op cit* Chapters V, VI and IX.

[93] M. Senyonjo *op cit*, 449.

National Assembly.[94] The rest of the country comprised smaller kingdoms[95] – which enjoyed a semi-federal status – and segmented societies like the Jopadhola who fell under this ill defined arrangement.[96]

The Bill of Rights under Article 24 (8) outlawed unwritten penal laws and by implication their procedural rules. Traditional criminal law therefore ceased to exist at least in national legal theory and was not recognized under national law. This abolition was meant to recast African criminal justice systems along European lines.[97] The response by communities was to resist and continue with the hearing of court cases, particularly those that involved spiritualism and some form of purification. Although this resistance is not well documented, my field study among the Jopadhola Jo-Gem and Morwa Guma clans shows how clan courts continue to try criminal cases and create their own sense of procedural justice. They have done so by purposely combining the local with the modern notions of justice as reflected in Uganda's national framework, as a deliberate strategy to survive.[98]

The Independence constitution was abrogated by the 1966 Interim constitution that came into force on the 15th April 1966. Since it was neither debated nor discussed, but just posted into the pigeon holes of the members of parliament, it has been fittingly described as the 'pigeon hole constitution'.[99] Existing kingdoms like Buganda, together with their traditional rulers, were abolished under Article 118. Events that led to the making of the 1966 constitution evolved from the manner in which the colonial masters had pitted different parts of the country against each other under the indirect rule policy. Prime Minister Milton Obote (from northern Uganda) wanted to form a united republic, but the Baganda (central Uganda) were not willing to relinquish their Kingdom and unite with the rest of the country. Controversial land distribution by the colonialists to Buganda, led to the disenfranchisement of other ethnic groups, culminating into a battle between Obote (for the disenfranchised) and Buganda's King - the *Kabaka*. The *Kabaka* was forced into exile in the United Kingdom by Obote who

[94] H. Morris and J. Read *op cit* Chapter 4 pointing out that the constitution was written by diverse groups with self interests.
[95] Kingdoms that were abolished included those of Ankole, Bunyoro, Toro and Busoga.
[96] J. Oloka-Onyango *op cit* 157-159. On the constitutional developments in Uganda during this period, see H. Morris and J. Read, *op cit*: Chapter 3, and G. Kanyeihamba *op cit* Chapter 2.
[97] R. A Bush, 'Modern Roles for Customary Justice: Integration of Civil Procedure in African Courts' (1974) 26 (5) *Stanford Law Review* 1123-1159, 1123 note 2.
[98] Clan court processes are investigated in detail in Ch. 6 and 7 *op cit*.
[99] J. Oloka-Onyango *op cit* 158, also M. Senyonjo *op cit* 450.

took over the power of government on 22nd February 1966.[100] The legality of the 1966 constitution and authority of the government was challenged in *Uganda v Commissioner for Prisons Ex Parte Matovu*.[101] There the Constitutional Court, basing itself on the theory of Hans Kelsen, decided that the taking over of power by the Prime Minister, abrogation of the 1962 constitution and its replacement by the 1966 constitution was a 'victorious revolution' establishing a new order.[102]

Once again, the 1966 constitution had no mention of economic, social or cultural rights. Although the Bill of rights was retained, it was 'watered' down by subordinating it to state interests as reflected in the President's wide powers.[103] Such powers included declaration of an unlimited state of emergency as well as arrest and detention without trial. This paved the way for abuse of human rights and creating fertile ground for the foundations of yet another constitution.

The 1967 constitution replaced the 1966 constitution. Under the 1967 Republican constitution, whose underlying philosophy was aptly described as 'absolute centralism', Uganda became a Republic.[104] Article 118 nullified the status quo of Buganda as a state within a state and abolished traditional monarchies in Uganda.[105] The constitution maintained the 'weakened' Bill of Rights that was still subject to the President's extensive powers. For example, there was imposition of a state of emergency without limitation, arrest and detention without trial. These acts negated the substance of human rights.[106]

Post independence Uganda was politically unstable as different groups, factions and political parties fought for power. The single most destructive regime was that of Idi Amin that saw the suspension of the constitution, abolition of parliament and destruction of the judiciary. Legislative authority was taken over by the executive:

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[100] S. Kiwanuka *Amin and the Tragedy of Uganda* (Munchen:Werltforum Verlag,1979) 27 –29 on reasons for the overthrow of Obote. D. Nabudere (2004) *op cit* 3-6.

[101] *Uganda v Commissioner for Prisons Ex Parte Matovu* [1966] EALR 514.

[102] M. Senyonjo o*p cit* 450-451. N. Bazaara in K. Kibwana, C. Maina and N. Bazaara (eds.) (2001) *op cit* 54-55 observes quite rightly that the *Ex Parte Matovu* decision made the judiciary seem toothless.

[103] 1967 constitution *op cit*. Under Article 64 the President could promulgate ordinances in 'exceptional circumstances' and executive power vested in the President under Article 65. F. M Sekandi and C. Gitta 'Protection of Fundamental Rights in the Uganda Constitution' 26 (1994) *Columbia Human Rights Law Review* 191-214, 202. The Bill of Rights was in Cap III: Article 15 was on fair trial protection.

[104] A. Mayanja, then a Member of Parliament, in 'The Government's Proposals for a New Constitution of Uganda' 32 (1967) *Transition* 20-25, 23. This fulfilled Prime Minister Obote's wish to form a united republic.

[105] *Ibid.* Mayanja decried the abolition of kingdoms arguing that they were 'inimical' to the building of a national state.

[106] M. Senyonjo *op cit* pages 451-452. Mayanja *ibid*, condemning the erosion of fundamental rights and freedoms.

power was vested in the President alone and parliament was in abeyance. To validate this usurpation of power, Amin suspended key articles of the constitution.[107] Although the Bill of Rights remained unchanged, it was difficult to enforce in the years that followed, which marked the worst violations of human rights in Uganda's history. A notorious example was when the then Chief Justice, B. Kiwanuka decided to apply the law judiciously and granted bail to a man who had been detained for a long period without trial. Kiwanuka's decision was regarded as an act undermining the powers of the President and he was murdered on Amin's orders.[108]

The abolition of the rule of law lasted 8 years (1971-1979) during which time 'official' courts of law existed marginally with little effective jurisdiction.[109] The clan courts instead thrived because they filled a vacuum created by the undermined official court system. After the overthrow of Amin in 1979, there were a series of short lived governments that tinkered with the constitution but leaving the Bill of Rights intact.[110]

After a protracted war, the National Resistance Movement under the leadership of Yoweri Museveni took over power in January 1986 promising a fundamental change and the defence of human rights.[111] In 1988, a Constitutional Review Commission was appointed with 21 commissioners; hand picked by the Minister for Justice and chaired by B. Odoki, now the Chief Justice. Its task was to review the 1967 constitution to establish a free and democratic society of government that would guarantee the fundamental rights and freedoms of the people of Uganda.[112]

After a debate in the Constituent Assembly of elected representatives, the new 1995 constitution was born.[113] There were criticisms about the composition of the Constituent Assembly. A significant number were supporters of the ruling National Resistance Movement party (now 'Movement Party') and it has been argued that the

[107] Under Legal Notice 1 of 1971 these were: Article 1 on supremacy of the constitution, Article 3 on its amendment and Article 63 on the legislature.
[108] S. Kiwanuka *op cit* chapter Four.
[109] D. Nsereko (1995) *op cit* 18-19.
[110] Between 1980 to January 1968 there were several governments: D. Nabudere (2004) *op cit* 15-17 gives a political analysis of these regimes of the Uganda National Liberation Front governments of Lule, Binaisa and Muwanga; the Milton Obote II Administration and the military junta of Tito Okello. Also J. Mubangizi *op cit* note 20. The governments mainly suspended the articles in the constitution giving power to the legislature.
[111] *Ten Point Programme of NRM*, (NRM Publications: Kampala, 1985) 30-34: one of its ten points was cooperation with other African countries to defend human rights using democracy.
[112] The Commission was set up under the Uganda Constitutional Commission Statute 1988 Section 2. Its terms of reference are available at http://www.parliam.go.ug/history.htm visited on 10/10/2008. N. Bazaara *op cit* 45-46 criticises the work of the commission on the grounds that questions they asked were biased, resulting in answers that led to entrenchment of the 'Movement' system in the constitution.
[113] The constitution was adopted on the 22nd September 1995. Article 287 repealed the 1967 Constitution.

constitution reflects mainly Movement ideologies, not public consensus.[114] Waliggo, however, points out that the debate centred on human rights.[115] Indeed, Uganda's constitution recognises human rights standards as valid norms. Chapter 4 contains a Bill of Rights more detailed than previous ones. Article 28 protects the right to a fair trial. Notably, the constitution has made strides in the protection of women and marginalised groups (like children) by proscribing laws, cultures, customs and traditions that undermine their status.[116] The constitution also re-establishes traditional rulers and kingdoms in Article 246 following a push by Buganda for restoration of their Kingdom.[117] Still, Article 28 (12) outlaws unwritten penal law impliedly traditional criminal law.

Uganda is now a Republic with a democratically elected government where all arms of the state are enjoined to uphold the rule of law. This constitution has an article not found in any other African constitution. Under Article 126(1) judicial power shall be exercised in accordance with the law and the 'values, norms, and aspirations of the people'. This provision creates space for the continued operation of traditional clan law at some level within the court structure of Uganda. Despite legislative abolition of traditional criminal jurisdiction, legal pluralism gradually evolved and now consists of two procedural traditions. One is the national system based on common law trial procedures buttressed by due process, and the other is a traditional restorative justice process based on communitarian values.

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[114] Uganda Constituent Assembly Statute No 6 of 1993, S. 4 on the composition of members. Others were army representatives, presidential nominees and key political party representatives. J. Oloka-Onyango *op cit* 168-169, criticises the lack of justification for these categories. Some like J. Waphakabulo as President Museveni states in his biography, *Sowing the Mustard Seed* (Fountain Publishers: Kampala, 2007) was his close friend: 26, 54. Wapakhabulo was appointed chairman of the Constituent Assembly. In 2001 the executive through the Ministry for Justice and Constitutional affairs, decided to review the constitution. A Commission of Inquiry was set up with its 15 members handpicked by the Minister to represent different interest groups including the government: Legal Notice No. 1/2001 Section 3. Their terms of reference included a review of the role of traditional and cultural institutions and a review of the Bill of rights to consider whether the death penalty should be abolished under S. 4 (o) and (h). The Commission recommended that the death penalty should be retained and that government provide for the maintenance of traditional institutions: *Report of the Commission of Inquiry (Constitutional Review): Findings and Recommendations* (10th December 2003) Chapters 13, 17 and 18. The Government accepted these recommendations in *Government White Paper on the Report of the Commission of Inquiry and Government Proposals not Addressed by the Report of the Commission of Inquiry* (*Constitutional Review*) (2004): para 12.3 (1). No amendment to the constitution was required.

[115] J. Waliggo 'Constitution-making and the politics of democratisation in Uganda' in H. Hansen and M. Twaddle (eds.) *From Chaos to Order: the politics of constitution making in Uganda* (Kampala, London: Fountain Publishers, James Currey, 1995). He was a Commissioner. Waliggo revealed that some representatives wanted the entire ICCPR to be incorporated in the constitution: 33. This did not happen.

[116] Article 32 (2) 1995 constitution *op cit* as amended by the Constitution (Amendment) Act 2 of 2005.

[117] J. Oloka-Onyango *op cit* 163-165 observes that the debate over restoration of kingdoms and traditional rulers was riddled with conflict between the government and Buganda's monarchists.

The foregoing discussion shows that within the Bill of Rights, procedural rights in Article 28 and communitarian values (alluded to in Articles 37 and 126(1)) remain in contradistinction to each other. This emanates from a constitutional history of transplantation of western human rights norms, excluding even 'African' provisions of the African Charter. Even the peremptory terms of Article 126 cover an uneasy mix of normative standards: individual rights (law) and communitarian values, which are not always mutually compatible. This incompatibility is not dealt with by the courts in their 2009 decision on procedural rights in mandatory sentencing. The scale of this problem becomes clearer in the next section.

Section 4: Constitutional interpretation of traditional values and norms

A critical analysis of the jurisprudence on procedural rights in sentencing brings to the fore issues arising from the constitutional interpretation of Article 126 (1). These are a failure to distinguish the normative context in which the law is applied and an unimaginative application of precedent. This section expounds my third argument that adopting such a narrow construction of Article 126(1), negates any prospect that a pluralist interpretation of human rights in sentencing can be achieved.

(i) Distinguishing the normative context of sentences: past trends

Three public institutions safeguard human rights in Uganda. The first is the Uganda Human Rights Commission whose mandate is to investigate complaints and monitor government's compliance with international treaties.[118] The second is the Inspector General of Government that provides oversight of administrative behaviour.[119] The third are the courts of law, mandated to interpret the constitution in light of human rights standards.[120]

[118] Functions of the Commission are under S. 8 Uganda Human Rights Commission Act Cap 24, and Article 52 constitution *op cit.*

[119] Constitution *ibid* Article 225 on functions of the Inspectorate. Article 226 provides that its jurisdiction is restricted to 'officers and leaders whether employed in the public service or not'. The Inspectorate of Government Act 2002 (amended by Act 11 Constitutional Amendment Act 2005) sets out its functions in S.8.

[120] *Ibid*, Article 137. The Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules, Statutory Instruments 13-13, 13-14, and 13-15 stipulate the procedure for interpretation of the constitution.

Although constitutional human rights jurisprudence is emerging, the challenge is to develop home grown African jurisprudence to strengthen norm enforcement.[121] From the early 1990s, academics criticised the lacklustre performance on human rights issues by a Ugandan judiciary, historically constrained by a 'doctrine of judicial 'restraint' rather than judicial 'activism'.[122] Failure to take the initiative was viewed by some as indicating a lack of appreciation by the judiciary of the importance of interpreting statutory law from a human rights perspective.[123]

Gradually the Ugandan courts became active in interpreting the scope and effect of substantive human rights law in 'traditional' punishments like witchcraft as happened in *Abuki*'s case. As we saw previously in *Abuki*, the Supreme Court held that banishment under the Witchcraft Act was incompatible with Article 24 of the constitution that prohibits cruel, degrading and inhuman treatment and Article 26 (2) that protects the right to property. Furthermore, banishment was grossly disproportionate with the seriousness of the offence.[124] I do not fault this reasoning, but note that the Supreme Court did not apply the peremptory terms of Article 126 (1) in arriving at its decision. The court relied instead on precedent as an aid in construction.[125]

Abuki's decision, in my view, shows that Uganda's jurisprudence has not developed a systematic engagement with the human rights question of clan court sentences. By this I mean that the court did not draw on sentencing principles implicit both in international human rights law and communitarian values. Had they done so, the court could have established that *both* systems protect individual rights by proscribing banishment. For instance, the lower court record shows that *Abuki* pleaded guilty before officials including the clan chief, and was fined the witchdoctor's costs

[121] C. Heyns and F. Viljoen, 'The Regional Projection of Human rights in Africa: in P. T Zeleza and P. J McConnaughay (eds.) (2004) *op cit* 132.
[122] J. Oloka-Onyango, 'Judicial Power and Constitutionalism in Uganda' in M. Mamdani and J. Oloka-Onyango, (eds.) *Uganda: Studies in Living Conditions, Popular Movements, and Constitutionalism*, (JEP & CBR: Kampala, 1994) 50-55.
[123] L. T. Ekirikubinza, 'The Judiciary and Enforcement of Human Rights: Between Judicial Activism and Judicial Restraint' (2002) 8 (2) *EAJPHR* 145-173, 171-172. She argues that a human rights interpretation of statutory law does not mean the courts are seeking to supplant the role of the legislature or the executive, but are acting in pursuit of constitutionalism.
[124] *Attorney General v S. Abuki* Constitutional App. No. 1 of 1998 (SC) *op cit* discussed in Ch.6 S.6 (i) and Ch. 7 S. 3(ii) *op cit*. There, Kanyeihamba G. JSC, at 354-356 and Mulenga J. JSC, at 348-349, point out that constitutional protection of human dignity through prohibition of cruel, inhuman and degrading punishment did not exist when the 1957 Witchcraft Act was passed.
[125] *Ibid*. For example, Wambuzi, W. CJ, at 269-272, relied on the Canadian case of *Osborne v Queen and 2 others* [1991] DLR 321 in arriving at his decision. Neither counsel for either side based their arguments on Article 126(1).

and a cow. This fine was restorative and arguably in conformity with traditional punishments of the Langi ethnic group whence the case originated.[126]

In my view, this was an opportunity for the Supreme Court to give dicta by which opposing normative standards could be reconciled. A legal tool at the judge's disposal was *gratis dictum* that includes a court's discussion of issues not raised by the record.[127] Alternatively the court could use *obiter dictum* and make a non-essential judicial comment while delivering a judgement.[128] Smit and Ashworth also make a compelling argument for the use of a reasonable hypothetical case by the courts in determining whether a sentencing law is unconstitutional or contrary to human rights.[129] The court could use any of these three options to address the question of tensions that arise among traditional laws of other ethnic groups. For example, the Jopadhola regard banishment from the village or clan, as *protection* for the community from such anti-social crimes. Such views run contrary to the *Abuki* decision and substantive human rights law because banishment violates individual rights. Reconciling such conflicting aims of punishment would necessitate mitigating divergent normative standards. The court's narrow approach, however, thwarts any such mitigation. A similar legalistic approach was adopted in defining procedural rights in mandatory sentencing that I discuss next.

(ii) Distinguishing normative context: procedural rights in sentencing

In 2003, the first ever petition for recognition of procedural rights in mandatory sentencing was filed before the Constitutional Court in *Sarah Kigula and others v Attorney General*. One of the issues before the court was whether a mandatory sentence of death denies a defendant a fair hearing on sentence contrary to Article 28(1).[130] The majority of the court per Okello JA., held that the sentencing procedure in Section 98 TIA was '(…) repugnant to the principle of equality before the law and fair trial'

[126] This evidence of prosecution witnesses 1 and 3 is in the lower court record of *Uganda v Salvatorio Abuki* Magistrate court case 109/95. The Supreme Court *ibid* at 278, made a passing reference to the lower court record, but no mention is made of the clan punishment of reimbursing the witchdoctor's costs and a cow.
[127] B. Garner (ed.), *Black's Law Dictionary* (2004) *op cit* 485.
[128] *Ibid*, 1102.
[129] D. Smit and A. Ashworth 'Disproportionate Sentences as Human Rights Violations' (2004) 67 (4) *Modern Law Review* 451-560, 557-559.
[130] *Sarah Kigula and 416 others v Attorney General of Uganda* Constitutional Petition No. 6 of 2003. Lead judgement of G. Okello, JA of 10th June 2005 at page 25 with A. Twinomujuni, JA and C. Byamugisha, JA concurring; and A. Bahigeine, JA and S. Kavuuma, JA dissenting. The petition challenged the legality of the death penalty stating that it represents a violation of the right to life.

because Section 98 does not permit the convict to be heard in mitigation before sentencing. Further, the court is not permitted to inform itself on the appropriateness of the sentence.[131] Okello pointed out that the term 'fair trial' is not defined in the constitution and in any case the elements of a fair hearing are not exhaustively listed in Article 28. For instance, the right to be heard in mitigation before sentence, the right of the court to make inquiries before passing sentence and the right to determine the appropriateness of sentence are absent.[132] The court declared that provisions of all principal legislation that prescribe mandatory sentences are inconsistent with Article 28. It also ordered that offenders be accorded a hearing in mitigation on mandatory sentence, and that trial courts should exercise their discretion on whether or not to confirm a mandatory sentence.[133]

In 2009, the Supreme Court in *Attorney General v Susan Kigula and others* upheld the decision of the Constitutional Court in part. The majority held that a petitioner must be granted a right to be heard on a mandatory sentence.[134] The judgment is a victory for international human rights only, for as I argue below; it fails to develop jurisprudence on the integration of communitarian values. This is because the principles of constitutional interpretation were not applied in the normative context of Article 126(1).

Principles of constitutional interpretation are found in the constitution and decisions of the Supreme Court and the Constitutional Court. The most important principle is in Article 126 (1).[135] Other principles include social justice and a liberal approach of the court as set out in *Tinyefunza's* case.[136] The courts are exhorted to be

[131] *Ibid*, 39-40. The detailed text of S.98 TIA is in S. 2 (i) above.
[132] *Ibid*, 34.
[133] *Ibid*, 62-63.
[134] *Attorney General of Uganda v Susan Kigula and 416 others*, S. C. Constitutional Appeal No. 3 of 2006, Judgment of 21st January 2009 at page 45, per B. Odoki, CJ, J. Tsekoko JSC, J. Mulenga JSC, G. Kanyeihamba JSC, B. Katureebe JSC, and C. Kitumba Ag, JSC, with Egonda-Ntende Ag. JSC, dissenting.
[135] I exclude 'aspirations of the people' under Article 126(1) from my analysis. Other principles not analysed here include: the widest construction to be given to ordinary meaning of the words; and a written constitution prevails over precedent, practice and unwritten conventions: per Okello 9-10; per Twinomujuni 7-9 and per Bahigeine at 6 in *Sarah Kigula op cit*.
[136] Social justice is found in constitution *op cit* Preambular para. 3. In *David Tinyefunza v Attorney General* Constitutional Petition No. 1 of 1996, it was held that the approach of the court should be: 'dynamic, progressive and liberal or flexible, keeping in view ideals of the people, socio-economic and political-cultural values so as to extend the benefit of the same to the maximum possible.'- judgment of S. Manyindo DCJ, at 16. Also in constitutional petition of *Zachary Olum vs Attorney General* Constitutional Petition No. 6 of 1999, A. Twinomujuni JA, at 4, held that the Bill of rights needs to be interpreted in light of the social, historical context of 'Uganda's constitutional instability and chequered

adventurous by Ugandan scholars. Some like Walubiri, want a 'reinvigorated' judiciary ready to moderate a 'rigid' state law and translate Article 126(1) into human rights jurisprudence using international instruments as an aid to construction.[137] Others like Tumwine-Mukubwa maintain that the broad constitutional mandate in Article 126 can only be achieved by an activist court that acknowledges its powers in making laws is within constitutional limits where constitutional interpretation involves applying constitutional values.[138]

While I agree with both views, I argue that Article 126(1) also denotes traditional values and norms as *constitutional values* and an aid to construction. Communitarian values are intrinsic to traditional normative standards and arguably form part of social justice and the socio-economic, politico-cultural values referred to in *Tinyefunza*'s case. Therefore communitarian values *are* constitutional values within the context of Article 126(1). Also as Murungi argues, social cohesion is intrinsic to the construction of African jurisprudence that views human beings in their social setting. This is because African traditional law recognises the communal connotation of being a person. Adopting such a communal connotation would avoid a derivative conception of jurisprudence that only investigates legal rules both substantive and procedural.[139]

The courts have not used a pluralist approach to the interpretation of Article 126 (1): one that would protect procedural rights while applying the communal connotation of a person. Rather, they adopt a strict terminological interpretation using the 'ordinary and plain meaning' of the words in the statute.[140] Consequently, the reasoning of the constitutional court reveals a narrow legalist approach. For instance, Twinomujuni only considered the first part of Article 126 (1) stating that exercise of judicial power must be in conformity with the *law*.[141] Okello adopted a more moderate approach. He agreed that values and norms of the people must be considered, but cautioned that the spirit of the constitution must not be 'compromised'. Okello rightly held that a death sentence in the context of Article 22 (1) must follow a fair trial, which means hearing both sides. He then considered Article 126(1) in light of the principle of separation of powers,

history on human rights'. Other case law includes: *AG v Tinyefunza* Constitutional Appeal No. 1 of 1997 and *P.K. Ssemogerere and another v AG* Constitutional Petition No. 3 of 2000.

[137] P. Walubiri *op cit* 89-92.

[138] G. Tumwine-Mukubwa, 'Ruled From The Grave: Challenging Antiquated Constitutional Doctrines And Values In Africa' in J. Oloka-Onyango (ed.), *Constitutionalism In Africa: Facing Opportunities, Facing Challenges* (Kampala: Fountain Publishers, 2001) 302.

[139] J. Murungi *op cit* 522-523.

[140] *Sarah Kigula* petition *op cit*, per Okello at 19.

[141] *Ibid*, per Twinomujuni at 45-46.

viewing mandatory sentencing as an intrusion on the powers of the judiciary to adjudicate. For Byamugisha, strict adherence to the principle of independence of the judiciary presupposes that courts are not to be guided by legislative provisions that deprive courts of the independence in exercising their judicial power.[142] Twinomujuni's pronouncements aptly surmise the court's view:

> '[It] should be clear (…) that sentencing is a judicial function and not a legislative function. (…) the 1995 constitution in Article 126 prescribes the only limits to the exercise of judicial power and the legislature must now learn to trust that judges have enough sense of responsibility to bear in mind Article 126 when considering whether to impose a death sentence or not.'[143]

Clearly the exercise of judicial power is viewed in the context of conformity with the law and not norms and values of the people. In her dissenting judgment, Bahigeine reasoned that the court looks at circumstances including 'widely-held societal norms, values and aspirations' that she regarded as public opinion.[144] Public opinion, she reasoned, is no substitute for the duty of the court to interpret the constitution and uphold its provisions. She agreed with the Attorney General's submission that in passing sentence, a court exercises a value judgment as to contemporary norms and aspirations to adhere to 'a consensus of values in the civilised international community of which Uganda is a part'.[145] However, Bahigeine did not pursue this line of reasoning in coming to her decision that there was no need for specific rights in mandatory sentencing. Moreover, the constitutional court did not search for evidence or literature of these societal norms and values.

The Supreme Court upheld the decision of the Constitutional Court on the interpretation of Article 126 (1). The judges reasoned that where the death sentence is 'pre-ordained' by the legislature, this compromises the principle of a fair trial.[146] In their opinion, Section 98 TIA that prohibits a defendant sentenced to death from making a statement in mitigation is inconsistent with the principle of equality under the law. Section 98 also contradicts Section 94 that appears to permit any accused person to present mitigation factors before sentence is passed. The judges reiterated that the entire

[142] *Ibid*, per Byamugisha at 28-29.
[143] *Ibid*, per Twinomujuni at 46.
[144] *Ibid*, Dissenting Judgment of A. Bahigeine of 10th June 2005 page 6. Counsel for the petitioners, Mr. Katende, argued that court should not base itself on public opinion.
[145] *Ibid*, 11.
[146] *Attorney General v Sarah Kigula* judgement, *op cit*, page 41.

trial from arraignment to sentencing comprises administration of justice under Article 126.[147]

These arguments are legally sound. However, both the Constitutional Court and the Supreme Court failed to distinguish the normative context in which the law is applied. In my view Article 126 (1) combines two normative contexts: the law (national) then norms, values (and aspirations) of the people (traditional). To interpret Article 126(1) in the normative context means the courts ought to view the traditional restorative justice model as representing people's norms and values within a social setting. This setting is based on a communal connotation of being a person. By concentrating on interpretation of rights within the context of administration of justice only, the courts did not consider Article 126(1) in the societal context as protecting an individual's rights within the communal connotation of being a person. This may be, as Bahigeine's judgment shows, because the judges equated norms and values to public opinion.

The courts also did not approach Article 126(1) in light of cultural values, as required by the *Tinyefunza* decision. Also no reference was made to Articles 17 and 27 in the African Charter, or it's associated Guidelines, on duties, traditional and cultural values. This may be because unwritten traditional criminal law is prohibited by Article 28 (12) of the constitution. Still, a distinction could be made between unwritten traditional law, and the informal participatory process for adjudicating cases. The fruits of an informal participatory process can be treated as circumstantial evidence as the *Obua* case shows. Moreover, participatory process is alluded to in Article 37 on the right to practice culture. Neither the *Obua* case, nor Article 37 was drawn upon by the courts to attempt a reconciliation of the normative frameworks.

With regards to social justice, only a cursory point was made by Okello about it being a principle of interpretation.[148] No further mention was made of it. Nor did the courts, interpret Article 126 (1) in light of clause (2) where the courts must inter alia, award adequate compensation and promote reconciliation in adjudication of criminal matters.[149] Article 126 (2) resonates with communitarian values of restitution and

[147] *Ibid*, 42-44. Chapter 17 *Constitutional Review Report op cit* discusses Article 126 in the context of administration and access to justice.
[148] *Sarah Kigula* judgement, *op cit*, page 10.
[149] Article 126 (2) (a)-(e) enjoins courts while adjudicating criminal and civil cases to apply the following principles: ensure justice is done irrespective of social or economic status, ensure justice is not delayed,

reconciliation. By drawing on these similarities, the court using a pluralist approach could arguably have created a richer jurisprudence that defined an African notion of procedural rights in sentencing. This would have included interactive characteristics of the participatory approach as part of social justice.

I acknowledge this task is not straightforward because, as I argued previously, doctrinal constructions do not take into account traditional justice issues. Firstly interpreting human rights is based on seeking redress in the court of law.[150] Secondly, despite the canons of construction discussed above, courts adopt a legalistic approach based on a strict adherence to the doctrine of precedent. I turn to this next.

(iii) Applying Stare Decisis

Stare Decisis (let the decision stand), the basis of the doctrine of judicial precedent, is one method by which the translators (judges) interpret legal principles or explain how a procedural rule or system ought to work in different structural models (institutions).[151] By so doing, judges could reconcile these divergent paradigms.

The Supreme Court in *Kigula* did not rely on any precedents in arriving at their decision on procedural rights in sentencing. The Constitutional Court on its part, noted that decisions from foreign jurisdictions with similar constitutions are helpful in interpretation. Equally, decisions of international courts and international human rights bodies are relevant to the interpretation of rights and freedoms.[152] For example, Okello in his judgment, quoted *in extensuo* from two foreign judgements: *Mithu v State of Punjab* and *Soering v UK*, to support his argument that for a person facing a mandatory sentence, the procedure must be fair and reasonable.[153] In her dissenting judgment, Bahigeine JA., reasoned that a court may seek direction from other common law jurisdictions. She also observed that foreign decisions relied upon in the lead judgement were from countries with no equivalent of Article 126.[154] Despite her correct observation, Bahigeine still relied entirely on the Indian decision in *Surja Ran v State of*

award adequate compensation to victims, promote reconciliation between parties, and administer justice without undue regard to technicalities.

[150] A. An-Naim (2001) *op cit*, 105.

[151] M. Langer *op cit* at 5, discussed in Ch. 1 S. 4 and Ch.3 S. 4 *op cit*.

[152] *Sarah Kigula* judgement, *op cit*, per Twinomujuni at 9: para (i) (j).

[153] *Ibid*, per Okello at 36-39 relying on the ratio decidendi in *Mithu v State of Punjab (1983)* Sol Case No. 26 and *Soering v UK* [1989] EHRR 439. Twinomujuni at 33-39 also quoted *in extensuo* from *Mithu* and *Reyes v The Queen* [2002] UK PC 11 on judicial discretion in sentencing.

[154] *Ibid*, per Bahigeine at 22.

Rajanshan as precedent. She used it to support her argument that punishment should be fair, should take into account rights of victims to have the assailant punished, and meet society's reasonable expectation for appropriate punishment.[155]

This strict adherence to precedent has evolved since the colonial era. Following the abolition of native courts, customary law had to be proved as a question of fact. The view was taken that it would be incorrect for superior courts to treat decisions of local courts as binding on them.[156] This approach was the reverse of the 'inverted' doctrine where on matters of customary law, if an established decision of the lowest native court was the only one available on the point, and was not barbarous or against natural justice, then it was binding on the highest court or even the Privy Council.[157] Uganda's independence government hoped (mistakenly as it turned out) that customary law would gradually wither away. This is why there was no move to restate or attempt to unify customary law as happened in neighbouring Tanzania and Kenya.[158]

Heyns and Viljoen rightly observe that there remains a test for African courts to develop indigenous human rights jurisprudence and not merely rely on precedents from western jurisdictions without testing their applicability to local conditions.[159] Others like Paul, describe judges as incapable of "escaping the tyranny of the kind of narrow, legalistic and positivistic outlook that has too often characterised the jurisprudence of African courts, and that is antithetical to the growth of rights."[160] Ugandan courts clearly adopt a narrow legalistic outlook, relying on precedents from western, even African jurisdictions, but not adequately testing their appropriateness for the local context. The problem therefore is the *uncritical* application of foreign precedents, the upshot of which is a failure to apply Article 126 (1) to shape Ugandan jurisprudence.

Consider the treatment by the Supreme Court of the celebrated *Makwanyane* case, where the South African constitutional court declared that the death penalty was

[155] *Ibid* at 23-27, applying the ratio in *Surja Ran v State of Rajanshan* A.I.R 1997 SC 18.
[156] A. Allot 'Judicial precedent in Africa revisited' (1968) 12 *Journal of African Law* 3-31, 30-31 citing the decision in *Angu vs Attah* [1874-1928] Privy Council Judgment 43 (Ghana 1916) that became binding on all the courts in Africa.
[157] T. O Elias, 'Colonial Courts and the Doctrine of Judicial Precedent' (1955) 18 *Modern Law Review* 356-370, 365.
[158] T. Verhelst referring to the background paper of the Uganda government entitled 'Integration of the court systems in Uganda' at the *African Conference on Local Courts and Customary law* 94 (1963): *Safeguarding African Customary Law: Judicial And Legislative Processes For Its Adaptation And Integration*, Occasional Paper No.7, African Studies Centre, University of California, Los Angeles (1968), 17 note 83.
[159] C. Heyns and Viljoen, *op cit* 132 citing Viljoen (1998) 432-36.
[160] J. Paul, 'Participatory Approaches to Human Rights in Sub Saharan Africa' in A. An-Na`im and F. Deng (eds.) *Human Rights in Africa* (1990) *op cit* 236.

unconstitutional.[161] The judges rightly considered *Makwanyane* as a good precedent for the abolition of the death sentence in situations where a constitution does not expressly proscribe it. This is the case in South Africa.[162] But the judges did not consider *Makwanyane* as setting a precedent on constitutional interpretation of norms and values in a traditional normative context. Yet, crucially in *Makwanyane*, the South African court aligned itself with *Ubuntu* values in abolishing the death penalty.[163] It did so by creatively 'translating' *Ubuntu* (which was not defined in the Interim constitution) as a constitutional value, using principles of interpretation under Section 35 of the South African constitution.[164] The court per J. Mokgoro was of the view that Section 35 recognised the 'paucity of home grown judicial precedent upholding human rights', and that indigenous value systems were a premise on which the court could proceed.[165] Mokgoro accentuated that such enduring values are not the same as fluctuating public opinions that even if collected on a scientific basis, may be prejudiced or uninformed.[166] She justified the importance of an all inclusive values system as a foundation on which to develop human rights jurisprudence encompassing *Ubuntu*:

> 'Although South Africans have a history of deep divisions (…), 'one shared value and ideal that runs like a golden thread across cultural lines is the value of *Ubuntu*-a notion now coming to be generally articulated in this country.'[167]

Sachs, J, developed this argument further.[168] In his view, the function of the constitutional court is 'to pay due regard to the values of all sections of society and not

[161] *S v T. Makwanyane and M Mchunu* [1995] 3 SA 391, (CCT3/94).
[162] *Attorney General v S. Kigula*, S. Ct Constitutional Appeal judgement *op cit* at 34-37.
[163] *Ubuntu* as we saw in Chapter 2 refers to 'humaneness' that translated loosely means 'a person can only be a person through others': J. Mokgoro in *Makwanyane op cit* at 308.
[164] Under S. 35 of the South African Interim constitution, courts must 'promote values that underlie an open and democratic society based on human dignity, equality and freedom' and consider international law and foreign case law for guidance in constitutional interpretation. S. 35 now renumbered S. 39 under the Constitution of the Republic of South Africa 1996 (includes the 13th amendment) provides in clause 3 that 'the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.' In this regard, the South African constitution explicitly protects rights or freedoms under customary law.
[165] *S v Makwanyane and another, op cit,* Mokgoro judgement at para 304.
[166] *Ibid,* para 305. Mokgoro dismissed the Attorney General's argument that public opinion was in favour of retention of the death penalty.
[167] *Ibid,* para 307. At paras 300, 308-309 Mokgoro reasoned that *Ubuntu* encapsulates values like interdependence of members of a community, group solidarity, fairness and collective unity. Similar views were expressed in the judgments of Langa J, at paras 223-5; Madala J, at paras 237-250 and Mohamed J, at para 263.
[168] *Ibid,* para 367. Sachs identified constitutional provisions that acknowledge legal pluralism. For example S. 181 on the application of indigenous law and Constitutional Principle XIII where indigenous law shall be recognised and applied by the courts subject to fundamental human rights and legislation: para 367. An exhaustive critique of the problems associated with the application of African customary law under the South African Constitution is undertaken by C. Himonga and C. Bosch 'The Application

confine ourselves to the values of one portion only, however exalted or subordinate it might have been in the past.'[169] In his interpretation of Section 35, the court had to refer to the common law *and* traditional African jurisprudence. This was *obiter dictum* because although materials were presented in the search for values consistent with the text and spirit of the constitution, these matters were not properly canvassed in the court by Ms Davids – Amicus Curiae. In a detailed critique of African research, Sachs underscored the importance of acknowledging adjudicatory systems based on rational procedures that were well entrenched in traditional societies.[170]

Sachs nonetheless placed a caveat on recognition of traditional African law and procedures. He rejected an automatic adoption of aspects of traditional law that are inconsistent with freedom and equality, suggesting instead an ascription to those that enrich the fundamental rights in the constitution: the 'rational and humane adjudicatory approach.'[171] The main weakness with Sach's reasoning is in not specifying *who* will discard or develop such aspects and values of traditional African law to ensure compatibility with the constitutional principles. Be that as it may, he gives some tentative suggestions for a judicial approach to drawing on positive values and mitigating the negatives in traditional law.[172]

Some points for consideration arise. Firstly, although the Uganda constitution has no equivalent of Section 35, the latter is *in pari materia* with the principles of constitutional interpretation enunciated by Uganda's Constitutional Court. Secondly, Article 126 is more concise than Section 35 as it refers *specifically* to values and norms. Therefore a need for conceptualisation of these terms arises. In this regard, the speeches in *Makwayane* contain dicta relevant to an exploration of this conceptualisation. Thirdly, Mokgoro makes the important point that values are not the same as fluctuating public opinions that may be prejudiced or uninformed. Communal values discussed in Chapter 2, underpin normative frameworks within which the traditional restorative justice model operates. Public opinion is not *the* normative framework by which a society is governed, although arguably, not all public opinion is irrelevant. For instance,

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Of African Customary Law Under The Constitution Of South Africa: Problems Solved Or Just Beginning? (2000) 117 (2) *South African Law Journal* 306-341.

[169] S. *Makwanaye op cit* per Sachs, J at para 370.

[170] *Ibid,* paras 373-379. These were studies of the Tsonga speaking peoples, Kafirs, Cape Nguni and the Barlong.

[171] One of Sach's three aspects of traditional justice is the well developed judicial process of traditional societies. The other two: punishment by military leaders to instil discipline and extra-judicial vigilante justice to execute suspected witches, are to him incompatible with freedom and equality: *ibid* at 381.

[172] *Ibid*, paras 382-383.

there is anecdotal evidence in Uganda's Criminal Justice Baseline Survey 2002 that the study participants in Tororo district were completely opposed to the death penalty, arguing that it is a violation of human rights.[173] Such public opinion was not relied on by the Ugandan courts in the *Kigula* cases.

As Anderson puts forth, local values like *Ubuntu* have the potential to influence development of jurisprudence. Elsewhere, Mokgoro argues that for a legitimate law to be created for South Africa, it is crucial that cultural experiences must be integrated with legal notions and techniques.[174] I agree with both views which, in my opinion, apply with equal force to Uganda's legal situation.

A valid explanation for the uncritical application of precedent is the legal requirement for courts to try only those issues canvassed before them. Since the issues in the *Sarah Kigula* cases were on national law only, then it follows that the judges' reasons are in order. Further, with the abolition of traditional criminal law, the judges cannot rely on an 'illegal' system to seek answers. To do so would render the judgments *per incuriam* and of no legal significance. Another plausible reason is the absence of academic scholarship.

(iv) Lack of academic input

The paucity of Ugandan academic research on a traditional notion of rights in sentencing is both a reflection of the narrow outlook of the courts and lack of academic scholarship in the area. During my field interviews, I established that the Chief Justice and other judges were very knowledgeable about the significance of clan courts and their jurisdiction.[175] Yet curiously, the president of the Judicial Officers Association told me that judicial officers lack a 'reading culture'[176] which may explain the non reliance on academic work in their judgments. To illustrate: both the *Sarah Kigula* judgments lack any reference to Ugandan or African academic scholarship, yet a

[173] JLOS Survey (2002) *op cit* at 125. Coincidentally, my study area of West Budama North was in Tororo district.
[174] A. Anderson, *op cit* at 10. J.Y Mokgoro, *Ubuntu and the law in South Africa*, P.E.R (1998) at 1, cited in A. Anderson at 10.
[175] Interviews with the Chief Justice, Justice C. Byamugisha, Justice C. Kitumba, *op cit*; also Justice M. Maitum and Justice R. Kasule on 25th August 2006 and Justice J. W Tseekoko on 31st August 2006.
[176] Interview with the President of Judicial Officers Association on 4th September 2006.

starting point could have been the report of the 2002 Regional Conference on post traditional justice.[177]

Equally, some judges decried the dearth of academic scholarship on traditional clan law.[178] I verified this complaint by searching unsuccessfully for recent doctoral and masters of laws theses in this area.[179] The academics, though, were very supportive of my research.[180] This lack of initiative may be attributed to the nature of legal training that is biased towards adversarial trials, little academic interest in developments of contemporary traditional law as contrasted with recent transitional justice issues, and lack of funding for research in universities.[181] A detailed discussion of these factors falls outside the scope of this thesis.

To summarise, Uganda's state practice raises some challenges for the ICC on the application of principles of national law using precedent. The challenges involve negotiating gaps in national legislation, distinguishing the normative context in which the law is applied, avoiding a deferral to precedent from 'enlightened' legal systems and adopting a broad interpretation within narrow confines of statutes. It is too early to tell how the ICC would interpret issues of communitarian values within traditional justice in response to Kony's objections. I predict such issues will come up in situations like Uganda, where as Drumbl puts it, the ICC becomes an option of 'exit' in which complex processes of justice are 'externalised onto a foreign entity'.[182]

[177] The conference papers and report is in the EAJPHR (2002) *op cit*, analysed in Ch. 3 S. 2 *op cit*. Academic scholarship could bolster the court's reasoning through conceptualisation of traditional norms and values using existing doctrines of interpretation or analogy; or help distinguish foreign judgments that are inapplicable to Uganda's situation. Alternatively, the court could invite academics as amicus curiae: a friend of court, or the academia could apply to be amicus curiae, or submit their opinions to court.

[178] For example, Judge Kasule who decided *Kiwuwa* v *Serunkuma and Namazzi*, lamented the lack of academic articles and books on contemporary customary law. What exists is old and outdated. Interview on 25th August 2006.

[179] Makerere University, Main Library visited on 27th July 2006 and August 2008. Makerere is the oldest research university in Uganda.

[180] Interviews at the Law Faculty on 27th July and 1st August 2006. L. Ekirikubinza was one of the few law academics with research interests in criminal law and traditional restorative justice. The list of academics interviewed is in Appendix 4 under 'Makerere University'.

[181] M. Mamdani *Scholars in the Marketplace: the Dilemmas of Neo-liberal Reform at Makerere University, 1989-2005* (Codesria: Dakar, 2007) gives an excellent analysis of the crisis in research at Makerere university. Others like Nabudere acknowledge the dearth of research in traditional mechanisms in local communities *op cit* (2002) 39. Also D. Mabirizi 'Some aspects of Makerere's legal Education in Development' 66 (1986) *Third World Legal Studies* 63-78 examines the theoretical and practical content of the syllabi and curricula of Makerere Law Faculty.

[182] M. Drumbl *op cit* at 146. See Chapter 1, S. 1*op cit* for Kony's objections to a trial by the ICC.

Section 5: Conclusion

This chapter has attempted to explain the salutary lessons that state practice provides for the ICC concerning how to draw on convergence and mitigate divergence between two incongruent normative frameworks. Challenges include the lack of appropriate sentencing guidance due to the illegal status of clan courts and lack of supportive legislation and case law. Uganda's antiquated procedural rules also fail to engage the victim, offender and community and do not take into account other sets of values legitimate to local communities. Worse still, sentencing reforms and case law on procedural rights in sentencing do not accommodate traditional restorative process. Crucially, international procedural rights and communitarian values are not fully protected in the sentencing process, so their influence is minimised.

Uganda's constitution has no definitive African concept of procedural rights. It does not protect duties or cultural values or even rights of others as required by the African Charter. For instance, the constitution has no provisions obliging traditional courts to protect individual rights during the trial. This lacuna is due to the turbulent history evidenced in the evolution of the Bill of Rights. What that development does not reflect, is a sense that traditional values should be incorporated into legal process. Ultimately, Article 28 proscribes clan courts' unwritten laws. Also Article 37 only gives an individual the right to practice culture, but does not protect communitarian values referred to tangentially in the cultural objectives of the constitution as 'cultural values'. The tension between these two articles is exacerbated by the lack of confluence with traditional law on participatory rights for victims and the community.

By adopting a wider construction of rights, national courts could arguably aid the ICC (and other international tribunals) by providing African jurisprudence and guidance on how to reconcile international with national laws to ensure fair, culturally relevant sentencing outcomes. This opportunity was missed in the *Sarah Kigula* cases, where the superior courts did not adopt a more radical interpretation of Article 126 (1). This 'omission' arises from normative rigidity in constitutional interpretation. Such rigidity prevents an audit of the transformation of structures and doctrine during transplantation, along the lines of that adopted briefly by Sachs, J in the *Makwanyane* case.

The ICC will need to move beyond state practice in order to find out how to achieve an appropriate type of normative reconciliation between the two procedural models. This requires a more flexible, theoretical and pragmatic approach that permits consideration of when traditional restorative justice may be appropriate (and when not) and for what stage of the sentencing process. This culminates into one main issue which is this. To achieve an effective procedural rights approach to sentencing, there is need for a theoretical model within which such changes to procedural approach can be made. The changes must be based on a pluralist interpretation of rights within this restructured theoretical model. This will be discussed in the next chapter as part of my concluding remarks.

CHAPTER NINE: TOWARDS A TRANSLATION THEORETICAL MODEL IN SENTENCING

In seeking to reconcile international sentencing outcomes with values of localized communities through an application of procedural rights, this thesis addressed two questions. The first question was whether the ICC could make its sentencing outcomes more legitimate in the traditional African context. The thesis then considered the question of how such legitimacy could be achieved. Key to the inquiry was the divergent interests between the international and traditional procedural models.

These interests fall in two broad areas. First, at the structural level, the traditional process-oriented model conflicts with the international procedure-oriented model. For instance, the participatory approach is at variance with the judge controlled approach. Second, at the doctrinal level, international criminal procedure is premised only on protection of individual rights contained in international instruments.[1] Yet individual procedural rights based on principles of autonomy and equality, stand in contradistinction to communitarian values of duty to kin, restitution, reconciliation, and the role of ritual. For example, the right to legal representation conflicts with the communitarian duty to protect kin. This shows that protection of communitarian values in the ICC sentencing framework remains problematic. Ultimately, we need international sentencing norms to relate to the local context in order to gain domestic validity.

In order to fulfil its objective of engendering respect for international criminal justice, I argued that the ICC needs to be more accommodative of distinct features of African restorative justice, and apply procedural rights as a normative bridge between the two models. The thesis has tested these arguments against the two frameworks. The results show that there are lessons to be drawn from the operation of clan courts' de facto sentencing regime. Furthermore, there is a pressing need for a theoretical model on which to build a normative bridge based on a wider construct of procedural rights.

This concluding chapter illustrates how the ICC could achieve this goal of reconciling competing interests using my theoretical translation model. My model will be useful in assessing the role of judges in the 'Africanisation' of international criminal procedure. Within current modes of legal thought it is imperative that we examine the

[1] S. Zappala (2003) *op cit* 246, C. Safferling *op cit* 366-367.

possibility that individual rights and communitarian goals could co-exist and complement each other in a way which would have widespread appeal (although not universal appeal) *and* protect procedural rights in sentencing. The ICC sentencing framework is arguably tolerant of such a plurality of ideas.

Two broad doctrinal proposals flow from this. First, the translation model is the only one that takes into account modest changes in approach and sentencing practice that could be made by judges. Secondly, the translation model is the only one that is built on a liberal-communitarian notion of rights using the doctrine of precedent as a legal tool for interpretation. This chapter neither offers a detailed procedural framework nor a shopping list of practical doctrinal solutions, but only pinpoints some foundations for a fresh approach.

Immediately after this introduction, I summarise the main outcomes of the research (Section 1). This is followed by the theoretical model set out in two sections. The first shows how to borrow distinct features from the Jopadhola through minor structural transformations (Section 2). The second shows how to apply a liberal-communitarian approach through an adaptation of the Jopadhola notion of rights, using precedent (Section 3). I then offer a brief conclusion summarising my contribution to knowledge (Section 4).

Section 1: Outcome of the research

This section summarises the main findings of the thesis. I start by reminding ourselves what we have discovered so far in our audit of the procedural dichotomies between the two sentencing frameworks, and issues for procedural rights.

The case of Joseph Kony and his Lord's Resistance Army (LRA) rebel commanders, filed before the ICC in 2005, is discussed in Chapter 1, setting the scene for the thesis. LRA leaders seek to evade the paradigm of international criminal justice by opting for trial under traditional justice systems and national law. The rebels signed the 27th June Agreement 2007 with the Uganda government. The Agreement and the 19th February 2008 Annexure, that received widespread national and international attention, reflect the parties' efforts to address gaps in international criminal justice: namely the exclusion of traditional African restorative justice processes. The provisions on purification and reconciliation rituals signify that the Agreement is concerned primarily with the importance of communitarian values to traditional restorative justice.

The Agreement also subtly highlights the need for an appropriate traditional notion of procedural fairness within international sentencing procedure. The point being that sentencing is the phase where traditional and international frameworks strongly conflict each other.

I now summarise the main findings justifying the need for reform. First, I established that international and traditional procedural frameworks are in tension with each other but do not draw on procedural rights as a normative bridge. Chapter 2 showed how under the existing theoretical framework, this lack of perception emerges. At the structural level, there are opposing procedural traditions between the international and traditional systems. Still, the ICC could under the Rome Statute, draw similarity between traditional restorative features and Article 76 procedures of public pronouncement of sentence and reparative hearings. At the doctrinal level, lies the conflict between individual rights and communitarian values. Thus, human rights are not perceived as a normative bridge between international and traditional procedural frameworks. The haphazard growth of international criminal procedure and human rights may be partly to blame for the lack of a systematic approach to accommodate features of non-state systems. This exacerbates exclusion of indigenous traditional processes and values within it.

In Chapter 3, the analytical debate revealed two opposing sides: the African and International apologists. The Africanist argument is premised on the fact that post-traditional (African) and modern (state/international) systems cannot co-exist: one must supersede the other. To this end, scholars like Nahimana propose reforms to the existing traditional institutions like the Burundi *Bashingantahe* institution. This institution is underpinned by non-negotiable interests that form human dignity called *Ubuntu*. None of the proposals address changes in the ICC itself. Instead, the debate shows gaps in knowledge on lessons that could be drawn from micro-level clan systems. Conversely, the international apologists reject any suggestion of accommodating a traditional African restorative approach. Some like David Crane, a former Chief prosecutor at the SCSL, do not envisage how African customary approaches could ever substitute for international criminal procedures.[2] Others like

[2] D. Crane *op cit* at www.law.case.edu/saddamtrial 55-56, 10/10/2005 quoted in Ch. 3 S. 4 *op cit*.

Apuuli, Drumbl, Findlay and Henham, put forth more concrete proposals on how traditional process could be accommodated.[3]

The Apuuli-Drumbl-Findlay and Henham debate leaves unanswered one question. This is how the ICC could achieve procedural legitimacy by addressing incongruent normative differences such as the centrality of supernatural beliefs in traditional justice. In response, I propose applying my translation framework that is based on a liberal-communitarian theory and an adaptation of M. Langer's translation model.[4] By so doing, I provide terms of reference for analysing transformations that take place when divergent structures and normative standards are transferred from one model to the next.

The second issue I established was that accommodating traditional restorative justice is problematic because international sentencing practice exhibits a degree of normative rigidity, excluding, as it does, participatory approach and communitarian values. In Chapter 4, I showed how sentencing practice of the ICTR and SCSL in Africa, indicate a preponderance of common law-civil law traditions and a rather narrow individualist construction of rights. The outcomes reflect the law's limited capacity to steer social change and achieve culturally relevant sentencing process. The exclusion of traditional restorative justice is epitomised in *Kamuhanda* (ICTR) where Judge Maqtu ruled that there was no system in international law like the traditional Gacaca to put into effect reconciliation. The SCSL seems outright dismissive of African values and local social practices as exemplified in the Civilian Defence Forces trial. The evidence suggests that international and 'mixed' criminal tribunals have failed to identify ways of adopting features of the African normative system. Clearly the problem lies with the lack of legal guidance on how to accommodate traditional restorative approaches and communitarian values within the narrow context of international law.

Thirdly, in Chapter 5, I showed that the African Charter on Human and Peoples' Rights (hereafter 'the African Charter') and its associated Guidelines,[5] fail to provide

[3] These are K. Apuuli's integrated transitional justice model; M. Drumbl's vertical-bottom up approach to procedure and sanction based on his cosmopolitan pluralism theory; and M. Findlay and R. Henham's retributive-restorative justice model for the ICC: all analysed in Ch.1 S.3 and Ch.3 S.3 *op cit*.

[4] I borrow the concept of translation wherein legal practice, legal institution or legal norm may undergo transformation by actors/translators within the target system: M. Langer (2004) *op cit* at 34-35. These actors include judges.

[5] *Principles and Guidelines on the right to a Fair Trial and Legal Assistance in Africa,* (2003) *op cit*.

for an African concept of procedural rights: one that melds individual rights with communitarian values. This arises from the wording of the Charter that is not intended to include communitarian values. There is also lack of clarity on the application of the Guidelines to traditional courts that were abolished by some African states. Part of the problem may be attributed to the African Commission on Human and Peoples' Rights (hereafter 'African Commission') itself. Its decisions do not provide guidance on the relationship between communitarian values and international procedural rights and how they may be applied 'jointly' as an African notion of procedural fairness. Lessons on such 'joint' applications may be gleaned from the experience of the Inter American Court of Human Rights (IACtHR). Such experiences may shape jurisprudence of the newly created African Court of Human and Peoples' Rights (ACHPR), and the African Court of Justice and Human Rights (ACJHR).

My findings now move from diagnosis to remedy. The fourth finding in Chapter 6 was that Jopadhola clan courts have integrated features of national courts by creating a semi-regulatory framework, comprising the prosecutor, assessors, judges and quasi-governmental oversight of the Local council 1 chairperson. Such adaptations have maintained legitimacy and social control but without compromising on traditional clan law. This innovative approach seems more integrative than that pursued by international tribunals. For example, women and youth representation within clan courts are non-traditional features. Their integration has done much to counter the criticism that customary justice often turns out, on scrutiny, to be patriarchal justice.

Fifthly, I established that the Jopadhola notion of human rights reflects how internal discourse struggles to establish enlightened interpretations of cultural norms. I proved in Chapter 7 that clan courts have not altogether failed to apply procedural rights; rather they have done it through an expanded construct of human rights as an entitlement of *all* people, not just an individual. This is demonstrated in the social construction of roles where judicial and prosecutorial functions are shared communally through a participatory approach. A participatory approach is also used to mitigate underlying tensions with national law but without compromising communitarian values. The implications are that by safeguarding both communitarian values and individual rights using public participation, procedural guarantees like the right to language of choice and right to a trial without undue delay, are well protected. Arguably this approach achieves a fair, culturally relevant sentencing process.

It is worth reiterating that the Jopadhola lack a uniform prescriptive procedural rights framework. Rather, standard setting is done by clan courts operating independent from each other, from the clan governing body-*Nono*, the cultural institution of *Tieng Adhola*; and from the higher traditional courts. Nonetheless, there is evidence that in the clan courts, individual rights are sometimes abridged in preference to social responsibilities. This is exemplified in the lack of a right to appeal against mandatory purification rituals, as the courts endeavour to protect the clan from evil arising from crimes like incest. There is a lack of legal representation. A power imbalance in society, also results in lack of absolute procedural equality to women and youth.

Sixthly, I showed how state practice provides a salutary lesson for the ICC on how problematic it is for courts of law to underpin the reconciliation of divergent sentencing paradigms using a pluralist interpretation of procedural rights. In Chapter 8, I analysed reasons why the ICC may find it difficult to apply principles of Uganda's national law under Article 21(1)(c) of the Rome Statute. Firstly, Uganda's antiquated procedural rules fail to engage the victim, offender and community in sentencing. Secondly, Uganda's jurisprudence on sentencing principles fails to take into account other sets of values legitimate to local communities. Thirdly, the Bill of Rights has no definitive African concept of procedural rights. It does not protect duties, traditional and cultural values or rights of others as required by the African Charter. This lacuna is due to the turbulent history of the evolution of the Bill of Rights.

Finally, I established the failure by international, regional and national courts to use precedent as a tool of integration. In Chapter 4, I show how the ICTR and SCSL are bogged down by an unimaginative application of precedent. The same criticism applies to the African Commission. In Chapter 5, I argue that it remains a matter of speculation whether the newly operational ACHPR will depart from the approach of the African Commission, and apply precedent creatively so as to adopt a wider construction of procedural rights. National courts have fared no better. As illustrated in the *Sarah Kigula* cases in Chapter 8, Uganda's superior courts failed to apply precedent in such a way as to adopt a more expansive construction of Article 126(1) of the constitution. Yet Article 126(1) creates space for the continued operation of African customary law at some level within the court structure of Uganda. As H. Friman cautions, uncertainty will arise where new international procedural systems set up to handle issues arising in

a special nationalised context, are challenged by lack of precedents.[6] Uganda is a good test case of how this uncertainty will play out in practice, as there is nothing to suggest that reconciliation between traditional and International notion of procedural norms is on the cards.

In sum, international sentencing frameworks have not considered distinctive features of traditional restorative process that separate the two systems. As a result, theoretical issues concerning the integration of communitarian values have not been addressed. In the next section, I show how in seeking to reconcile these paradigms, the ICC could achieve local procedural legitimacy using a translation theoretical model.

Section 2: Synthesis in sentencing practice: borrowing from the Jopadhola

The first part of my model may be used to accommodate distinctive legitimate features of clan courts. Langer's model is instructive on how small structural changes to judges' disposition (procedural approach) could promote social fairness. Crucially, the ICC needs to build on similarity while mitigating divergence, subject to human rights concerns. This means the judges' ought to communicate effectively with the community about when such traditional features may be applicable under international procedures, or not. The *Akayesu* case as we saw in Chapter 4, demonstrates the strength of the international system in overcoming 'cultural' divides.

For a start, the ICC could easily build on similarity with traditional process, specifically the public pronouncement of sentence and giving reasons in the decision under Article 76(4), and Article 74 (2) and (5): Rome Statute. Both features are a source of strength, in terms of explaining the sentencing decisions to the public and resonate somewhat with the traditional participatory approach.

In mitigating divergence, the sentencing phase poses one human rights concern. As Zappala points out, international judges lack specific guidance on how to determine an appropriate sentence. He opines that judges may have to rely on a diverse set of factors that may lead to inequality of treatment among defendants.[7] While I agree with Zappala, his views mirrors the challenges the ICC could face in ensuring equality of treatment for *all* parties to an African conflict, specifically if it applies a participatory approach to deliberation of sentence. Based on my discussions throughout the thesis, I

[6] H. Friman (2004) *op cit* 355-356.
[7] S. Zappala, *op cit* 252.

now give three worked examples demonstrating how the ICC could accommodate a traditional notion of equal participation, without compromising on international due process safeguards.

First of all, the ICC Trial Chamber needs to be innovative in their interpretation of Rule 143, by recognising the parties' and community's right to participate or interject *sua sponte* during sentencing hearings. This approach would signify a willingness on the part of the ICC to be impartial in a traditional sense. However, Benda-Beckmann has shown that judges could not reproduce a traditional type of court even where they were fully aware of the norms and processes applied by the locals.[8] To circumvent this problem, the Trial Chamber could borrow the concept of a judge as a chairman (*Won Komi*) from the Jopadhola clan court models. Thus, the ICC would apply social fairness by permitting interjections *suo sponte* from all present, on the choice of sentence. The ICC would still apply legal fairness by protecting individual rights. Such approach would command public confidence especially for cases with mystical connotations, but does require attitude change, self restraint and acceptance of fallibility on the part of judges, to succeed.

A different procedural approach is likely for the deliberation of sentence in the Appeals Chamber, whose remit is to make a finding on whether trial proceedings were unfair in any way that affected reliability of sentence, or the sentence was affected by procedural error.[9] Moreover, appeal proceedings must be in writing unless the Chamber decides to convene a hearing.[10] Written pleadings are contrary to traditional review process like that of the Jopadhola, where deliberations are open to the public and parties alike. Although the Appeals Chamber may convene a hearing, it is questionable to what extent it can permit parties and the community to deliberate the sentence. What may be possible is for the judges to accept written submissions from the communities on the sentence, perhaps through amicus curiae.[11] While this is not the same as a participatory hearing, it signifies the willingness of the Appeals Chamber to engage with the local community through consideration of their written views.

A second option is to borrow the Jo-Gem concept of inviting a government official in a quasi judicial capacity to advise the clan court on matters of law. This

[8] F. V Benda-Beckmann *op cit* 29 and note 6 citing for instance G. R. Woodman's study of the application of customary law in state courts in Nigeria and Ghana (1985).
[9] Rome Statute, *op cit,* Article 83 (2).
[10] Rules of Procedure and Evidence of the ICC, (ICC RPE) *op cit,* Rule 156 (3).
[11] *Ibid,* Rule 103. S. Williams and H. Woolaver 'The Role of the Amicus Curiae before International Tribunals' (2006) 6 *International Criminal Law Review* 151-189, 151-154, 181-182 on the ICC.

would take care of the challenge that individualisation of sentence raises.[12] Individualisation of sentence, some argue, constrains the sentencing judge's discretionary powers to promote consequentialist objectives.[13] The ICC could still promote consequentialist objectives by inviting clan court officials under Article 76 (2) and (3) to advise on traditional process, punishments and accompanying rituals. Some clan leaders are retired senior civil servants who could easily adapt to the court atmosphere and take on this role. Being bi-lingual they could better articulate the community's interests in the sentencing outcome.[14]

In order to better protect the right to language of choice, modest changes could be made under Article 50(3). There, at the request of any party to proceedings, a language other than English or French could be used as the language of the court. Adopting Article 50(3) for sentencing hearings would depend entirely on the availability of judges, lawyers and other court officials who speak the local language fluently. The Jopadhola for instance, though one of Uganda's smaller ethnic groups, have over 15 practising lawyers who speak fluent Dhupadhola;[15] and Kony was able to marshal a legal team of 3 Acoli lawyers- fluent in Acoli, almost immediately.[16] The position with the ICC is more complex as its composition is international- there is only one Ugandan male judge: D. Nsereko.[17] Therefore this option may only be feasible for international hybrid tribunals like the SCSL.

Thirdly, on the issue of equality of representation, we saw how the Morwa Guma clan achieve this by reserving posts for women and youth representatives on the court. The recruitment of women into the ICC represents advancement in women rights. Out

[12] S. Zappala *op cit* defines the right to an individualised sentence to include determination of factors that affect sentence while protecting the principle of individual criminal responsibility.
[13] R. Henham (2005) *op cit* 84.
[14] Mr. N Odoi, a former Ambassador, former Permanent Secretary and former UNESCO Board Executive member is one of the highest qualified clan court officials among the Jopadhola. He was not among my study participants since he is from Budama South, but I met him informally in August 2006 and he expressed support for this idea.
[15] Uganda Law Society Register of practising lawyers at www.uls.or.ug/pdf/Members_Directory.pdf visited on 5/06/2008. This register excludes Judges, Magistrates, State Attorneys, and other enrolled lawyers who are not members of the Law Society (the equivalent of a Ugandan Bar Association). Members of Uganda's legal profession, are to a large extent fluent in their local languages- some are bi-lingual, others are even multi-lingual.
[16] Ayena Adongo, A. Owiny-Dollo and N. Mao were among the first lawyers to get involved in initial LRA- Government negotiations. These lawyers no longer represent Kony's interests.
[17] Details of the judges can be found on the website of the ICC, available at http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Chambers/The+Judges/The+Judges+++Biographical+Notes.htm visited on 5/05/2009.

of a total of 18 judges, 9 are women with 4 from Africa.[18] However, no ICC judge can be classified as youth, say between the age of 18 – 30, and this is not likely to change in the future. Yet youth representation is a distinctive feature of clan courts of which the ICC should take cognisance. The ICC could through effective communication explain why youth cannot sit on the ICC- primarily due to lack of required legal expertise. Better still, the ICC could invite youth to participate as 'interested' persons under Article 76 (3).

These changes influence protection of the right to a trial without undue delay. Admittedly, granting every person *locus standi in judicio* during sentencing hearings, like the Jopadhola clan courts do, may inadvertently lengthen the trial. Still, the overall addition (of say 1 hour) is miniscule, given that it is during sentencing that the need to accommodate local procedural interests is greatest. Moreover, a strict application of Rule 101 ICC RPE that permits the ICC to set time limits to ensure a fair trial would be a welcome development. Additionally, Rule 100(1) RPE permits the ICC to hold trials in any state.[19] Holding trials at the *locus criminis* reduces completion times, thereby enhancing procedural legitimacy of international trials.

Finally, the ICC could adopt a circular sitting arrangement to create a holistic atmosphere in which all parties feel part of the whole. This may not be feasible given the 'rectangular' sitting arrangement of the ICC. Furthermore, separating the public from the judges reduces further the public's role in international justice. The ICC's sitting arrangement is no different to that of other international tribunals, so achieving social fairness in this regard will depend largely on the judges' ability to change their procedural approach.

To surmise, building on similarity while mitigating difference through small structural changes, may lead to greater equality of treatment among all parties without compromising international procedural safeguards. These changes could resonate with communities like the Jopadhola whose processes lack judicial control over decision making. To this end, communities would appreciate the concerted effort of the ICC to accommodate elements of collective decision making. Of equal importance, is an examination of ways in which the ICC could accommodate communitarian values using a liberal-communitarian synthesis of rights.

[18] *Ibid*. The four women judges from Africa are Judge A. Kuenyehia (Ghana) and Judge F. Diarra (Mali) Judge S. M Monageng (Botswana) and Judge J. Aluoch (Kenya).
[19] Clause 91 of Uganda's ICC Bill *op cit* likewise provides for the ICC to hold trials in Uganda.

Section 3: Synthesis in procedural norms: Borrowing from the Jopadhola model

This section discusses the second part of my theoretical model. I show how the ICC judges (as translators) could synthesise liberal individual rights with traditional communitarian values. Langer's translation theory is helpful because it provides a framework within which we can take account of transformations at the doctrinal level, arising from transfer of legal norms. My model uses a procedural approach that leaves judicial discretion intact. There are two stages to this: adopting a liberal-communitarian theory and applying the doctrine of precedent as a tool of translation.

(i) Applying the Liberal-Communitarian theory

The Rome Statute is silent on communitarian values as a source of rights. Applying international human rights law under Article 21(3) Rome Statute therefore presents a challenge, because the ICC must give superiority to protection of individual rights of the defendant. Yet under traditional law, individual's rights are subordinate to community interests. It is here that translation provides a solution.

In order to apply a liberal-communitarian approach, the ICC would undertake three tasks. First, identify the rights that require a pluralist interpretation. Secondly, borrow from the relevant traditional clan law, underlying principles that have a common denominator with individual rights. Finally, attempt to bridge individual rights with communitarian values, based on the common denominator. Two worked examples will illustrate my point.

Take the example of the due process guarantee of the right to legal representation under Article 67(d)-Rome Statute. Legal representation, as an individual right, is unknown in Group B communities like the Jopadhola where it is the duty of kin to 'represent' the defendant. The ICC could therefore identify legal representation as being in need of a pluralist interpretation.

Next, the ICC could identify a traditional clan law, say of the Jopadhola, from which to borrow principles that share a common denominator with the due process norm. Jopadhola law for instance, provides that human rights are for all people. This embodies *Ubuntu* principles of natural justice that grant equal opportunity to all kin to participate in defence of the offender. Natural justice is also a common principle of international due process as enunciated by Bayles. His principle of 'inherent due

process' is ideal because it conforms to natural justice and gives all parties the opportunity to be heard. Applied under An-Na`im's principle of reciprocity, natural justice becomes a common denominator since both the ICC and traditional clan law operate under it.[20]

The third stage is creating a normative bridge based on the common denominator of natural justice. The premise would be that legal representation like other due process safeguards ought to apply equally to international sentencing hearings. The ICC could then set out the criteria by which the right to legal representation is admitted under the reciprocity principle. The judges would identify provisions in the African Charter that recognise the individual's duty to society (Articles 27 and 29(7)). An individual's duty could be construed to mean individual interests are *part* of society's obligations. The judges could then apply the African Charter more expansively to the individual right to legal representation, by considering natural justice as part of due process *and* the communitarian notion of equal participation by kin. This would permit kin (and community) to make representations on behalf of the offender under group rights (recognised in Article 17 African Charter).

In practice, the judges could use Article 76(2)-Rome Statute, to hold additional hearings thus permitting offender's kin to make representations. Additionally, under Article 76 (3), the judges during reparations hearings, could hear representations from the offender's kin, and the wider community as 'interested persons'. In light of the *Lubanga Dyilo* decision on victim's participatory rights,[21] it is extremely likely that the ICC will extend victims participatory rights under Article 68 (3) to the sentencing process.

By using Article 76 in this manner, the ICC would adopt a flexible principle that protects individual rights first, yet is elastic enough to adjust procedural guarantees to accommodate communitarian values of duty to kin. This in turn provides a yardstick by which the fairness of the sentencing process could be assessed. What this would require is balancing the notion of rights as entitlements, with the social obligations of the

[20] A. An-Na`im *op cit* (1990); An-Na`im *op cit* (1992); A. A An-Na`im, 'Towards a Cross Cultural Approach to Defining International Standards of Human Rights,' in A. A An-Na`im and F. Deng (eds.), *Human Rights in Cross Cultural Perspectives: A Quest for Consensus*, (Philadelphia: University of Pennsylvania Press, 1992) and M. Bayles (1986) *op cit*. To recap, Bayles's 'inherent due process' principles of participation and fairness permit all parties to have an equal opportunity to participate in the resolution of legal disputes. An-Na`im's cross-cultural dialogue is based on the principle of reciprocity that defines a common denominator and criteria by which a given practice may be judged as objectionable.

[21] *Prosecutor v T. Lubanga Dyilo* ICC-01/04-01/06-1432 of 18/01/2008 discussed in Ch. 2 S.3 (v) *op cit*.

kinship system. To this end, the reasoning of Judge Ramirez in *Plan Sanchez*,[22] that each category of collective and individual rights retains their autonomy and although inter-related, both categories are subject to protection by the court, is instructive.[23]

The ICC could also seek ways to communicate effectively with communities why absence of legal representation would be judged objectionable under international criminal law. To encapsulate natural justice in the social context, the ICC could apply national law, like Article 126 (1) of Uganda's constitution that provides for judicial power to be applied in conformity with norms and values of the people. Traditional norms and values could be applied by drawing on research studies like that on the Jopadhola, discussed *in extensuo* in this thesis

These 3 tasks and effective communication could be applied to other common denominators like inherent dignity of the individual that encapsulates autonomy and equality. The task for the court each time is to show how international due process safeguards are based on principles that encompass a traditional notion of equal participation and even handedness. The application of this formula is relatively straightforward but subject to one caveat: in cases of conflict, international criminal law prevails over the traditional.

To illustrate such conflict in international sentencing, I will use a worked example of the determination of sentence-done in private in international law,[24] but in public under traditional processes. First, the ICC needs to determine whether the right to a fair trial could be overridden by the duty of kin to participate in judicial functions. To do so, the judges could identify the right to a public hearing as a common denominator under both international human rights law and communitarian values-group rights. Next, adapting the formula set forth above, the judges could borrow the Jopadhola concept of *fuonji* (teaching) as a tool to help in creating cross cultural dialogue. *Fuonji* bears similar aims to expressivism (an educative function of international criminal justice). *Fuonji* could be employed to explain the rationale behind private deliberation of sentence: to keep the confidentiality of all arguments expressed by judges during deliberations. The judges could even draw similarities with the *Kamajor* secret societies where the entire trial and subsequent deliberations are in

[22] Separate Opinion of Judge S. Ramirez in the Judgement on Reparations in the *Plan de Sanchez Massacre* (November 19 2004) para 2, discussed in Ch. 5 S.5 *op cit*.

[23] The approach that I propose, builds on the established practice of interpreting international human rights adopted by international courts. The ICC could even draw inspiration from S. Greer's 'structural balancing' of rights discussed in Ch.3 S. 4 *op cit*.

[24] S. 74(4) and S. 78Rome Statute *op cit*, and Rule 142 (1) and Rule 145 ICC RPE *op cit*.

private. Even if, as seems likely, that does not convince acephalous communities (like the Jopadhola)–who deliberate the sentence in public, the ICC will have engaged in intellectual discourse towards finding common ideological ground. For the community, they will have been given a fair hearing based, a priori, on what their notion of fair sentencing hearing is, or should be like, even though they may view the international sentencing process and punishment as inappropriate.

In sum, a liberal-communitarian approach does not fetter judicial discretion. Rather, this approach enhances procedural legitimacy by applying an expanded notion of rights based on the principles of reciprocity, participation and fairness. Such notion views community as legitimate holders of procedural rights, while preserving autonomy and equality of the individual. I now examine how precedent could be used as a tool for applying the liberal-communitarian theory.

(ii) Using precedent as a tool of reconciliation

To apply the liberal-communitarian theory in sentencing requires a second stage. This stage applies precedent as a tool that enables judges to borrow traditional norms and make doctrinal transformations. I acknowledge challenges to the application of precedent: the dearth of relevant academic research, drought of national jurisprudence, and lack of guidance from the African Commission on an African notion of procedural rights. The thesis shows that a more deep rooted challenge, however, may be the approach of the ICC. The judges may fail to distinguish the normative context in which the law is applied; defer to precedent from 'enlightened' legal systems; or adopt a narrow construction of the law in such a way that it negates any prospect of achieving a pluralist interpretation of human rights in sentencing. To these challenges doctrinal solutions must be found.

To distinguish the normative text, one solution is provided by N. MacCormick who suggests that interpretation of law needs to undergo a radical change. The change necessitates substituting the purely interpretative argumentation based on precedent (that dictates conformity with previous judicial interpretation from superior courts) with a broader sphere of practical argumentation.[25] In practical argumentation, the court reflects on the values and principles appropriate to the institutions of the societies

[25] N. MacCormick, 'Argumentation and Interpretation in Law' 9 (1995) (3) *Argumentation* 467-480, 474, 476-478.

where people live, including procedural justice, equality before and under the law and human rights. Such values and principles must be considered when seeking the well reasoned approach to resolve interpretation in 'trouble cases'.[26] I posit that the Kony situation before the ICC is one such type of 'trouble' case where the ICC may need to apply practical argumentation while taking into consideration other factors.

One factor to be considered is that the doctrine of precedent prevents the ICC from relying on clan courts' largely oral jurisprudence since they are not courts of record. The ICC would need to develop *ratio decidendi* that draws on underlying principles of traditional justice. This is feasible in my view, if the ICC adopts practical argumentation by accommodating the values and principles of the specified community based on a pluralist interpretation of rights.

For such pluralist interpretation, the ICC may give *gratis dictum*: where the court makes a statement of a principle that is broader than is necessary to decide the case, or suggests rules and principles that are not applicable to the case being decided.[27] Alternatively, the court could issue *obiter dictum* where a judge makes a non-essential judicial comment while delivering a judgement.[28] Both dictums lack strong precedential value, but I maintain that *gratis dictum* is preferable because it is a judicial approach that involves an expansion of a principle which can then be discussed thoroughly. Also Drumbl makes the empirical argument that international judges do refer to theoretical principles in determining sentence.[29] Using *gratis dictum*, the ICC could apply national law- Article 126(1) Uganda's constitution, to draw on traditional norms and communitarian values. Speeches of judges, like those in *Makwanyane* that 'translate' traditional values into existing legislation may be distinguished by the ICC. The ICC could rely on available academic scholarship and existing research studies like that on the Jopadhola that analyse communitarian values and *Ubuntu* principles. *Gratis dictum*, if used creatively with MacCormick's practical argumentation, puts the ICC in the unique position of being able to use judicial precedent to meld international due process with communitarian values, without abridging individual autonomy and equality.

[26] *Ibid*, 478- 479.
[27] B. Garner (2004) *op cit* 485. As we saw in Ch. 8 S. 4 (i) *op cit*, the court could also discuss issues not raised by the record.
[28] *Ibid*, 1102.
[29] M. Drumbl *op cit* 60.

Significantly, the ICC could avoid a narrow construct of procedural rights in sentencing and deference to precedent from 'enlightened systems', say the IACtHR.[30]

(iii) Translating Procedural Rights: overcoming normative differences

Although precedent is a useful tool of translation, there remain facets of international human rights law that conflict with communitarian values especially where the latter override protection of individual rights. Two examples illustrate my point: ritual and imprisonment.

My model deals with ritual as a third phase of sentencing: one that does not detract from the universality of international law. Considering ritual in this way enables the ICC to escape the branding of 'white man's justice.' The ICC could combine penal objectives of rehabilitation, reintegration and reconciliation with communitarian values, to endorse those rituals that do *not* involve cruel, inhuman or degrading treatment. The ICC could also encourage the observation of such rituals, within the purview of the clan. Examples are obligatory reconciliation feasts, and reconciliation-cum-rehabilitation-cum-re-integration rituals like the Jopadhola *kayo choko* or Acoli *Mato Oput*. Affirmation of good social practices will arguably go a long way towards achieving local legitimacy, thus bridging the normative divide.

The ritual on the contrary, may involve cruel, inhuman or degrading treatment. Take the example of the purification ritual for incest among the Jopadhola, which involves whipping and stripping naked of offenders. The ICC ought to first identify the negative aspects of the ritual that conflict with a common denominator like inherent human dignity. During the sentencing hearing, the ICC could ask the community if the ritual cannot be waived - as was done in the *Odoi* case for the minors,[31] or substituted for rituals that protect human dignity. It is imperative that this issue is discussed to enable the community make a choice. The choice would be controlled by what An-Na`im refers to as culture's *internal criteria of legitimacy*. If the community fails to find internal values that link the ritual to human dignity, then they could turn to external standards, namely international human rights law. By so doing, my findings in Chapter

[30] I acknowledge that the ICC has used jurisprudence of the IACtHR as persuasive precedent in *Situation in Democratic Republic of Congo* ICC-01/04-101-tEN-Corr of 17/01/2006 *op cit* discussed in Ch.3 S.4 *op cit*. However, the Latin American procedures may not map directly onto African traditional practices which is why the ICC may have to borrow directly from African norms and communitarian values.
[31] *Re O. Odoi and L. Okongo op cit* discussed in detail in Ch. 7 *op cit* S.3 and S.5.

7 indicate that the community may well find such rituals *do* conflict with international human rights law.

If, as seems likely, the community still find international law is inapplicable and insist on applying the ritual, then the ICC would courteously decline to endorse this, giving their reasons for doing so. The ICC could use Smit's compelling argument that human dignity (based on Kantian's notion of respect for individual autonomy) is a core element that underpins sentences.[32] The ICC could then explain that all rituals that accompany the sentence must be compatible with human rights standards and not be grossly disproportionate to the sentence. Although the two sides may never agree, at least the ICC will have made an attempt at initiating cross cultural dialogue on protecting human rights standards, without outright rejection of the offending ritual.

Imprisonment as a punishment under international law appears to be inimical to the traditional notion of the right to liberty. If the ICC emphasises imprisonment as the predominant sentence, this will remain a bone of contention with communities like the Jopadhola, who favour traditional restorative options and for whom imprisonment is not 'indigenous'. Still, communication- through *fuonji* (teaching)- of how the retributive philosophy of imprisonment is no different from notions of retribution expressed in traditional punishments like banishment, may go some way towards promoting a local understanding of aims and purposes of imprisonment. That imprisonment and banishment are both underpinned by a punitive philosophy means that parallels may be drawn.

Equally, parallels could be drawn from restitution, compensation and rehabilitation penalties under Article 75 (3), Rome Statute. The ICC ought to consider applying these restorative punishments as far as possible, where they resonate with communitarian values like restitution and reconciliation. For instance, as Keller suggests, collective reparations could be administered through the Trust Fund, for victims of international crimes.[33] The ICC must nevertheless be mindful of the fact that collective reparations from the Trust Fund remove responsibility of compensation from the offender's community. A person may only be punished in accordance with the Rome Statute (Article 23), but as Smit persuasively argues, the Statute does not exclude the development of international customary law on acceptable national penalties

[32] D. Smit (2002) *op cit* 4-5; (2005) *op cit* 361-362. This point is also made in D. Smit and A. Ashworth (2004) *op cit* 542-547. Kant reasons that no person should be used solely as a means to an end.

[33] L. M. Keller, 'Seeking Justice at the International Criminal Court: Victim's Reparations' (2007) 29 *Thomas Jefferson Law Review* 189-218.

outside the Statute.[34] I would add that the ICC could arguably develop jurisprudence that considers traditional punishments that are comparable to national penalties. For example, restitution, compensation and reconciliation are applicable under Uganda's laws.[35]

In sum, the future of ICC sentencing may be shaped by traditional restorative justice and human rights imperatives, through cross cultural dialogue that engages directly with the community. This dialogue can be achieved so long as the ICC communicates effectively using a 'participatory' approach and *analogous* restorative philosophies, punishments and procedures to the traditional model. Even then, while affirming good social practices, the ICC must underscore the supremacy of international human rights law as a test for consistency. I now make my concluding remarks.

Section 4: Concluding Note

We have seen that integrating traditional restorative justice processes in an international model is a complex issue. This section identifies my contribution to knowledge on legal methods of dealing with this complexity when handling African conflict.

Firstly, my thesis has made a case for a theoretical reconciliation between international criminal procedure and African customary criminal law to achieve fair and culturally appropriate sentencing outcomes. Secondly, I have identified a theoretical construct that builds on similarities, while accommodating structural and normative distinctions. Thirdly, I have contributed a legal solution for international sentencing that uses an expanded notion of rights based on cross cultural dialogue. Fourthly, my case study of Jopadhola clan courts has expanded the range of viewpoints from kinship courts, providing insight into the ways in which the Rome Statute may be applied in the African context to better accommodate traditional restorative features. Fifthly, the thesis underscores the need for legislative measures to recognise traditional courts as a separate legal system and bring them within the ambit of international human rights

[34] D. V Z Smit, *Taking Life Imprisonment Seriously: in National and International Law* (The Hague: Kluwer Law International, 2002) 191 bases his reasoning on Article 80 under which national application of penalties not provided in the Statute, is retained.

[35] Magistrates Courts Act *op cit*, Trial on Indictments Act *op cit*, and Article 126 (2) (c) (d) of Uganda's constitution *op cit*. An overview of national penalties is in Appendix 9.

law. Developments in Latin America are a good starting point.[36] Finally, I posit that adopting a traditional restorative participatory approach, may have a part to play in preventing large scale war crimes because perpetrators will know that they are accountable to their kin and most importantly to the international community.

My theoretical model may go further and secure greater protection of individual procedural rights and legal principles in clan courts. The Jopadhola have shown the ability and willingness to assimilate some structures and principles of national law, thus indicating the possibility that communities may also adapt features from international criminal procedure. This may occur when the ICC transforms its trials somewhat to take into account traditional process and communitarian values.

Some broader questions remain. Firstly, will the reform be done in such a way as to undermine something important about international procedural justice? Secondly, will the ICC have to operate differently for different communities? I answer question 1 in the negative. The translation model ensures that the certainty and universality of international law remains intact. It only calls upon the judges to adopt a broader approach to the interpretation and application of the Rome Statute. To question 2, the procedural framework of the ICC (using translation) will be the same whichever community they are dealing with. Still, sentencing practice that translation suggests as appropriate, will differ according to the characteristics of the community concerned.[37]

A third question is: what is the consequence of the ICC not following my model? In response, I argue that a failure to accommodate my translation model will deny local communities an opportunity to have sentencing decisions that resonate with their sense of procedural justice. This could lead to what Drumbl defines as a 'democratic deficit' where non western procedures are excluded from international court processes, because of perceived national or ethnic inferiorities.[38] Extrapolating Drumbl's reasoning to the ICC, we can foresee that the upshot of a 'democratic deficit' may be that international sentencing outcomes remain culturally irrelevant. Additionally, the aim of the Rome Statute to gain respect for international criminal justice (locally) may be thwarted.[39] As

[36] In particular the decisions of the IACtHR and analysis of their work by scholars like D. Shelton *op cit*, J. Pasqualucci, *op cit*, and M. Guzman *op cit* discussed in Ch. 5 S.5 *op cit*.
[37] M. Drumbl *op cit* 20 argues quite persuasively, that it is not prudent to flatten difference through a 'one size fits all' process, in view of the distinct social geographies of various atrocities.
[38] *Ibid*, 136, 147.
[39] M. C Bassiouni, *Introduction to International Criminal Law* (Ardsley, N.Y: Transnational, 2003) at 703 calls this 'Potemkin' Justice where international criminal law remains extant and not relevant to communities.

Findlay and Henham caution, international criminal trials will be 'left behind as a symbol of international criminal justice' if they fail to engage with communitarian as well as individualist 'determinations.'[40] For Henham, failure to address specific weaknesses in the ICC may render it susceptible to become an 'unaccountable inter-state machinery' by suppressing offenders' and victims' rights in the pursuit of wider state interests.[41] Arguably, such entity could also subsume the rights of the community to participate in sentencing hearings in accordance with traditional norms.

At the very worst, the ICC will be viewed as administering 'white man's justice'. Perpetrators of atrocities may enter into agreements with governments (like the June 2007 Agreement) to 'escape' international criminal justice, encouraged by the example set by the Kony saga. Governments could, as has Uganda, recommend that traditional courts should handle war criminals:[42] but without appropriate procedural safeguards. Though the ICC is not precluded from trying small offenders,[43] such agreements are akin to the state colluding with offenders to evade international criminal justice.

On the positive side, the jurisprudence of the ICC enriched by an expanded notion of rights will create comparative penal jurisprudence that may strengthen African national, sub regional and regional courts to adopt a contextual interpretation of laws. Through precedent, the ICC jurisprudence could foster development of human rights jurisprudence that deals with the normative conflict of interests and the need for an African notion of procedural rights. The spin off effect will be the generation of academic scholarship on the positive contribution of contemporary African restorative justice to international criminal law.

An unintended outcome is my contribution on power equality before clan courts. My findings point to the importance of attitude change towards participation of women and youth (including children) in clan trials as key actors, not merely witnesses, victims or defendants. Encouraging this attitude change, coupled with economic empowerment, may promote equality before traditional clan law. This builds on the premise that equality before traditional law will remain a chimera, absent the economic

[40] M. Findlay and R. Henham, *op cit*, 337.
[41] R. Henham 'Some issues for sentencing' (2003) *op cit* 81-82.
[42] See Annexure to the Agreement on Accountability and Reconciliation of 19 February 2008 *op cit* para 23. Such a proposition is also contained in a report by TERL Limited (Kampala, 2006) entitled *Transitional Justice in Northern Uganda, Eastern Uganda and some parts of West Nile* at 50-55. A copy was availed to me by the JLOS office and is on my file.
[43] M. Drumbl *op cit* 146.

empowerment of women.[44] At the same time, we should not ignore those within traditional societies, who argue that traditional clan process based on equal participation of every person is inconsistent with the charge of power inequality.

In the final analysis, while the dominance of the Anglo-Franco procedural model cannot be changed or substituted, the translation model offers a progressive approach to adopting aspects of restorative justice based on convergence and mitigating divergence. The clan courts look forward to the day when international law will assimilate aspects of traditional criminal law. I believe my translation model offers the best opportunity to do that.

[44] Economic empowerment is evident in Jopadhola land tenure system nowadays. The case of Rose illustrates that Jopadhola do embrace the notion of individual ownership of land by women. Rose bought land in 2003 with her own money. The land was adjacent to but independent of family land owned by her husband. Her husband married a second wife and constructed for her a semi-permanent house on Rose's land. Following his death, the second wife was directed by the clan to demolish the house because it was built on Rose's land without the latter's consent. The second wife was permitted to build her house on the communal family land instead.

BIBLIOGRAPHY

Books and Book Chapters

T. Allen, *Trial Justice*: *The International Criminal Court and the Lord's Resistance Army* (London, New York: Zed Books, 2006).

R. Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, trans. Julian Rivers, 2002).

A. A. An-Na`im, 'The Legal Protection for Human Rights in Africa: How to do more with less,' in A. Sarat and T. R Kearns (eds.), *Human Rights*: *Concepts, Contests, Contingencies* (Michigan: University of Michigan Press, 2001).

A. A. An-Na`im, 'Towards a Cross Cultural Approach to Defining International Standards of Human Rights,' in A. An-Na`im and F. Deng (eds.), *Human Rights in Cross Cultural Perspectives*: *A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992).

A. A. An-Na`im, 'Problems of Universal Cultural Legitimacy,' in A. An-Na`im and F. Deng (eds.), *Human Rights in Africa*: *Cross Cultural Perspectives* (Washington, D.C: University of Pennsylvania Press, 1990).

E. Ankumah, *The African Commission on Human and Peoples' Rights* (The Hague: Martinus Nijhoff Publishers, 1996).

A. Ashworth, 'Victim's Rights, Defendants' Rights and Criminal Procedure,' in A. Crawford and J. Goodey (eds.), *Integrating a Victim Perspective within Criminal Justice*: *International Debates* (Aldershot: Ashgate/Dartmouth, 2000).

A. Ashworth, *Human Rights, Serious Crime and Criminal Procedure* (London: Sweet and Maxwell, 2002).

F. Ayume, *Criminal Procedure and Law in Uganda* (Nairobi: Longman Kenya, 1986).

M. L Balanda, 'African Charter on Human and People's Rights,' in K. Ginther and W. Benedek (eds.), *New Perspectives and Conceptions of International Law*: *An Afro European Dialogue* (Wien and New York: Springer-Verlag, 1983).

M. C Bassiouni, *Introduction to International Criminal Law* (Ardsley, N.Y: Transnational, 2003).

M. C Bassiouni, *International Criminal Court*: *Compilation of UN Documents and Draft ICC Statute before the Diplomatic Conference* (Rome: No Peace without Justice, 1998).

N. Bazaara, 'Mixed results in Uganda's Constitutional Development: An assessment of the year 1999,'in K. Kibwana, C. Maina and N. Bazaara (eds.), *Constitutionalism in East Africa*: *Progress, Challenges and Prospects in 1999* (Kampala: Fountain Publishers, 2001).

T. W Bennet, *Human Rights and African Customary Law* (Cape Town: Juta publishers, 1999).

T. W Bennet, *Human Rights and African Customary Law under the South African Constitution* (Cape Town: Juta, 1995).

E. Beyaraza, *Contemporary Relativism with Special Reference to Culture and Africa* (Kampala: Makerere University Printers, 2004).

E. Beyaraza, *Social Foundations of Law*: *A Philosophical analysis*, (Kampala: Law Development Centre Publishers, 2003).

G. Boas, *The Milosevic Trial*: *Lessons for the Conduct of complex International Criminal Proceedings* (Cambridge: Cambridge University Press, 2007).

C. M Bradley (ed.), 'Overview' *in Criminal Procedure: A World wide Study* (Durham: Carolina Academic Press, 1999).

J. Braithwaite, 'Principles of Restorative Justice,' in A. Von Hirsch, J. Roberts, A. E. Bottoms, K. Roach and M. Schiff (eds.), *Restorative Justice and Criminal Justice*: *Competitive or Reconcilable Paradigms?* (Oxford: Hart Publishing, 2003).

F. G Burke, *Local Government and Politics in Uganda* (New York: Syracuse University Press, 1964).

S. Byakutaga, 'The need to demystify legal language in Uganda,' in P.G Okoth, M. Muranga and E. O Ogwang (eds.), *Uganda*: *A Century of Existence* (Kampala: Fountain Publishers, 1995).

A. Cassese, *International Criminal Law* 2nd Ed. (New York: Oxford University Press, 2008).

R. Cohen, 'Endless Teardrops: Prolegomena to the study of Human Rights in Africa,' in R. Cohen, G. Hyden and W. Nagan (eds.), *Human Rights and Governance* (Gainesville: University Press of Florida, 1993).

M. Damaska, *The Faces Of Justice And State Authority*: *A Comparative Approach To The Legal Process* (New Haven: Yale University Press, 1986).

M. A Drumbl, *Atrocity, Punishment and International Law* (Cambridge: Cambridge University Press, 2007).

O. O Elechi, *Doing Justice Without The State*: *The Afikpo (Ehugbo) Nigeria Model* (New York &London: Routledge, 2006).

L. T Ekirikubinza, *Women's Violent Crime in Uganda*: *More sinned against than sinning* (Kampala: Fountain Publishers, 1999).

L. Ekirikubinza, 'Juvenile Justice and the Law in Uganda: Towards Restorative Justice,' in L. Lindholt and S. Schaumburg-Muller (eds.), *Human Rights in Development Yearbook 2003*: *Human Rights and Local/Living Law* (Leiden, Boston: Martinus Nijhoff Publishers, 2005).

T. O Elias, *The Nature Of African Customary Law* (Manchester: Manchester University Press, 1956).

R. Murray and M. D Evans (eds.), *Documents of the African Commission on Human and Peoples' Rights* (Oxford, Portland-Oregon: Hart Publishing, 2001).

A. Skelton and C. Frank, 'How does restorative justice address human rights and due process issues?,' in H. Zehr and B. Toews (eds.), *Critical Issues in Restorative Justice* (Monsey, NY: Criminal Justice Press and Willan Publishing, 2004).

H. Friman, 'Procedural Law of Internationalised Criminal Courts,' in C. P. R. Romano, A. Nollkaemper and J.K Kleffner (eds.), *Internationalised Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (Oxford: Oxford University Press, 2004).

B. A Garner (ed.) *Black's Law Dictionary* 8th Ed. (Minnesota: Thomson West, 2004).

A. Gerwith, *Human Rights*: *Essays on Justification and Applications* (Chicago: University of Chicago Press, 1982).

H. P Glenn, *Legal Traditions of the World*: *Sustainable diversity in Law* 2nd Ed. (Oxford: Oxford University Press, 2004).

M. Gluckman, *Politics, Law and Ritual in Tribal Society* (Oxford: Blackwell, 1965).

M. Gluckman (ed.), *Ideas and procedures in African Customary Law* (Oxford: Oxford University Press, 1969).

G. K McDonald and O. S Goldman, *Substantive and Procedural Aspects of International Criminal Law*: *the Experience of International and National Courts* Vol. I and II, (Cambridge, MA: Kluwer, 2000).

S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (New York, Cambridge University Press, 2006).

M. Guzman, 'Legal pluralism as an approach to Indigenous and Tribal people's rights' in L. Lindholt and S. Schaumburg-Muller (eds.), *Human Rights in Development Yearbook 2003*: *Human Rights and Local/Living Law* (Leiden, Boston: Martinus Nijhoff Publishers, 2005).

K. Gyekye, *African Cultural Values: An Introduction* (Accra: Sankofa Publishing Co, 1996).

K. Gyekye, *Tradition and Modernity: Philosophical reflections on the African experience* (New York, Oxford: Oxford University Press, 1997).

C. Jorda and J. De Hemptienne, 'The Status and Role of the Victim' in A. Cassese, P. Gaeta and J. Jones (eds.), *The Rome Statute of the International Criminal Court- A Commentary Vol. II* (Oxford: Oxford University Press, 2002).

M. Findlay and R. Henham, *Transforming International Criminal Justice*: *Retributive And Restorative Justice In The Trial Process* (Cullompton: Willan Publishing, 2005).

R. Henham, *Punishment and Process in International Criminal Trials*, (Hants, Burlington: Ashgate Publishing, 2005).

C. Heyns, 'Civil and Political Rights,' in M. D Evans and R. Murray (eds.), *The African Charter on Human and Peoples rights (1986-2000)*, (Cambridge: Cambridge University Press, 2002).

R. E Howard 'Group versus individual identity in the African Debate on Human Rights,' in A. An-Na`im and F. Deng (eds.), *Human Rights in Africa*: *Cross Cultural Perspectives* (Washington, D.C: University of Pennsylvania Press, 1990).

R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations and Results*, (The Hague, London, Boston: Kluwer International, 2002).

R. Young and C. Hoyle, 'Restorative Justice and Punishment,' in S. McConville (ed.), *The Use of Punishment* (Cullompton: Willan Publishing, 2003).

C. M Judd, E. R Smith and L. H Kidder, *Research Methods in Social Relations* 6th Ed. (Forthworth: Texas: Holt, Rhinehart and Winston for the Society for the Psychological Study of Social Issues, 1986).

E. Kannyo, 'The Banjul Charter on Human and Peoples' Rights: Genesis and political background,' in C. E Welch and R. I Meltzer (eds.), *Human Rights and Development in Africa* (Albany: State University of New York, 1984).

G. W Kanyeihamba, *Constitutional and Political History of Uganda*: *From 1894 to the Present* (Kampala: Centenary Publishing House Ltd, 2002).

S. R Kaurgire, *A Political History of Uganda* (Nairobi, London: Heinemann Educational Books Ltd, 1980).

S. Kiwanuka, *Amin and the Tragedy of Uganda* (Munchen: Werltforum Verlag, 1979).

T. Koopsman, 'Stare decisis in European Law', in D. O'Keefe and H. G. Scherners (eds.), *Essays in European Law and Integration* (Deventer: Kluwer, 1982).

M. Mamdani, *Citizen and Subject*: *Contemporary Africa and the Legacy of Late Colonialism* (Kampala: Fountain Publishers, 2004).

M. Mamdani, *Scholars in the Marketplace: the Dilemmas of Neo-liberal Reform at Makerere University 1989-2005* (Dakar: Codesria, 2007).

D. A Masolo, 'Western and African Communitarianism: A comparison,' in K. Wiredu (ed.), *A Companion to African Philosophy* (Malden, MA: Blackwell Publishing Company, 2004).

J. Mbiti, *African Religions and Philosophy* (London: Heinemann Educational books Ltd., 1970).

D. McGoldrick, 'Criminal Trials Before International Tribunals: Legality and Legitimacy,' in D. McGoldrick, P. Rowe and E. Donnelly (eds.), *The Permanent International Criminal Court*: *Legal and Policy Issues* (Oxford and Portland, Oregon: Hart Publishing, Studies in International Law, 2004).

I. Kane and A.C Motala, 'The Creation of a New African Court of Justice and Human Rights,' in R. Murray and M. D Evans (eds.), *The African Charter on Human and Peoples' Rights*: *The System in practice, 1986-2006* (2nd Ed.) (Cambridge: Cambridge University Press, 2008).

G. P Tumwine-Mukubwa, 'Ruled From The Grave: Challenging Antiquated Constitutional Doctrines And Values In Africa,' in J. Oloka-Onyango (ed.) *Constitutionalism in Africa*: *Facing Opportunities, Facing Challenges* (Kampala: Fountain Publishers, 2001).

R. Murray, *The African Commission on Human and Peoples' Rights and International Law* (Oxford- Portland Oregon: Hart Publishing, 2000).

R. Murray, *Human Rights in Africa*: *From the OAU to the African Union* (Cambridge: Cambridge University Press, 2004).

M. D Evans and R. Murray (eds.), *The African Charter on Human and People's Rights*: *the*

system in Practice, 1986-2000 (Cambridge: Cambridge University Press, 2002).

J. Murungi, 'The Question of an African jurisprudence: some Hermeneutic reflections,' in K. Wiredu (ed.), *A Companion to African Philosophy* (Oxford: Blackwell Publishing, 2004).

Y. Museveni, *Sowing the Mustard Seed* (Revised Ed) (Oxford: MacMillan Publishers, 2007).

S. Mvungi, 'Legal Analysis of the Draft Treaty for the establishment of the East African Community,' in S. Mvungi (ed.), *The Draft Treaty for the establishment of the EAC*: *A Critical Review* (Dar Es Salaam: Dar Es Salaam University Press, 2002).

D. Van Ness, 'Proposed basic principles on the use of restorative justice: Recognising the aims and limits of restorative justice,' in A. Von Hirsch et al (eds.), *Restorative Justice and Criminal Justice Competing or Reconcilable Paradigms* (Oxford: Hart Publishing, 2003).

G. Johnstone and D. Van Ness, 'The meaning of Restorative justice,' in G. Johnstone and D. Van Ness (eds.), *Handbook of Restorative Justice* (Portland, Oregon: Willan Publishing, 2007).

D. D. N Nsereko, 'Criminal Laws of Uganda,' in R. Blanpain (ed.), *International Encyclopaedia of Laws* (The Hague, London, Boston: Kluwer Law International, 1995).

D. D. N Nsereko, 'Victims of Crime and Their Rights,' in T. Mwene-Mushanga (ed.), *Criminology in Africa* 2nd Ed. (Kampala: Fountain Publishers, 2002).

A. Oboth- Ofumbi, *Lwo (Ludama) Uganda*: *History and Customs of the Jo Padhola* (Nairobi: Eagle Press, 1960).

B. A Ogot, *History of the Southern Luo*: *Vol. 1 Migration and Settlement 1500-1900* (Nairobi: East African Publishing House, 1967).

H. W Okoth-Ogendo, 'Human and Peoples' Rights: What Point is Africa Trying to Make?' in R. Cohen, G. Hyden and W. Nagan (eds.), *Human Rights and Governance* (Gainesville: University Press of Florida, 1993).

J. B Ojwang, 'Laying a Basis for Rights: Towards a Jurisprudence of Development' in G. R Woodman and A. O Obilade (eds.), *African Law and Legal Theory* (Aldershot: Dartmouth, 1995).

J. Barya and J. Oloka-Onyango, *Popular Justice and Resistance Committee courts in Uganda* (Kampala: New Vision Printing and Publishing Corporation, 1994).

J. Oloka-Onyango, 'Judicial Power and Constitutionalism in Uganda,' in M. Mamdani, and J. Oloka-Onyango (eds.), *Uganda*: *Studies in Living Conditions, Popular Movements, and Constitutionalism* (Kampala: JEP & CBR, 1994).

A. Orie, 'Accusatorial v. Inquisitorial approach in International Criminal Proceedings prior to the Establishment of the ICC,' in A. Cassese, P. Gaeta and J. Jones (eds.), *The Rome Statute of the International Criminal Court- A Commentary Vol. II* (Oxford: Oxford University Press, 2002).

F. Ouguergouz, *The African Charter of Human and People's Rights*: *a Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (The Hague, New York: Kluwer Law International, 2003).

J. M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge: Cambridge University Press, 2003).

J. Paul, 'Participatory Approaches to Human Rights in Sub Saharan Africa' in A. An-Na`im and F. Deng (eds.) *Human Rights in Africa: Cross Cultural Perspectives,* (Washington, D.C: University of Pennsylvania Press, 1990).

N. Pityana, 'The Challenge of Culture for Human Rights in Africa: The African Charter in a Comparative Context,' in M. D Evans and R. Murray (eds.) *The African Charter on Human and Peoples rights (1986-2000)* (Cambridge: Cambridge University Press, 2002).

H. F. Morris and J. S. Read, *Uganda*: *The Development of its Laws and Constitution*, (London: Stevens and Sons, 1966).

H. F. Morris and J. S. Read, *Indirect Rule and the search for Justice*: *Essays in East African Legal History* (Oxford: Clarendon Press, 1972).

J. Roscoe, *The Baganda*: *An account of their native customs and beliefs* (London: Frank Cass and Co Ltd, 1965).

L. Sadat, *The ICC and the Transformation of International Law* (Ardsley, New York: Transnational, 2002).

C. Safferling, *Towards an International Criminal Procedure* (Oxford: Oxford University Press, 2001).

W. A. Schabas, *The UN International Criminal Tribunals*: *The former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press: Cambridge, 2006).

W. A. Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2001).

V. Morris and M. P Scharf, *The International Criminal Tribunal for Rwanda*, Vol.1 (Irving-on Hudson, New York: Transnational Publishers: 1998).

V. Morris and M. P Scharf, *The International Criminal Tribunal for Rwanda*, Vol. II (Irving-on Hudson, New York: Transnational Publishers: 1998).

V. Morris and M. P Scharf, *An Insider's guide to the International Criminal Tribunal for the former Yugoslavia*, Vol. 2 (Irving-on Hudson, New York: Transnational Publishers, 1995).

F. Schauer, 'The Politics and Incentives of Legal Transplantation,' in J. S. Nye and J.D. Donahue (eds.), *Governance in a Globalizing World* (Washington, D.C: Brookings Institution, 2000).

A. Skelton and M. Sekhonyane, 'Human Rights and Restorative Justice,' in G. Johnstone and D. Van Ness (eds.), *Handbook of Restorative Justice,*(Portland, Oregon: Willan Publishing, 2007).

M. Shahabuddeen, *Precedent in the World Court* (London: Cambridge University Press, 1996).

L. P Shaidi, 'Traditional, colonial and present day administration of criminal justice' in T. Mwene-Mushanga (ed.) *Criminology in Africa* 2nd Ed. (Kampala: Fountain Publishers, 2002).

D. Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 1999).

D. Shelton, *Remedies in International Human Rights Law*, 2nd Ed. (Oxford, New York: Oxford University Press, 2005).

D. Shraga, 'The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions', in C. P. R. Romano, A. Nollkaemper and J.K Kleffner (eds.), *Internationalised Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (Oxford: Oxford University Press, 2004).

D. V Z Smit, *Taking Life Imprisonment Seriously*: *in National and International Law* (The Hague: Kluwer Law International, 2002).

D. Van Ness and H. Strong, *Restoring Justice* (Cincinnati, Ohio: Anderson Publishing Company, 1997).

N. Sudarkasa, 'African and Afro-American Family Structure' in J. B Cole, *Anthropology for the Nineties: Introductory Readings* (revised edition) (New York: The Free Press, 1988).

N. MacCormick and R. Summers, *Interpreting Precedents* (Hants: Ashgate Publishing Company, 1997).

L. Sunga, *The Emerging System of International Criminal Law* (The Hague: Kluwer, 1997).

O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*: *Observers' Notes, Article by Article* (Baden-Baden: Nomos Verl. Ges,1999).

F. Tulkens, 'Criminal Procedure: Main Comparable Features of the National Systems,' in M. Delmas-Marty (ed.), *The Criminal Process and Human Rights*: *Towards a European Consciousness* (Dordrecht: Martinus Nijhoff Publishers, 1995).

U. O Umozurike, *The African Charter on Human and Peoples' Rights* (The Hague, Boston, London: Martinus Nijhoff Publishers, 1997).

J. V Velsen, 'Procedural Information, Reconciliation and False Comparisons,' in M. Gluckman (ed.), *Ideas and Procedures in African Customary Law* (Oxford: Oxford University Press, 1969).

C. Heyns and F. Viljoen, 'The Regional Protection of Human Rights in Africa: An Overview and Evaluation,' in P. T Zeleza and P. J McConnaughay (eds.), *Human Rights, the Rule of Law, and Development in Africa*, (Philadelphia: University of Pennsylvania Press, 2004).

R. Volger (ed.), *A World View of Criminal Justice* (Aldershot: Ashgate, 2005).

J. M Waliggo, 'Constitution-making and the politics of democratisation in Uganda,' in H. Hansen and M. Twaddle (eds.), *From Chaos to Order*: *the politics of constitution making in Uganda*, (Kampala, London: Fountain Publishers, James Currey, 1995).

P. M Walubiri, 'An Analysis of International Human Rights Instruments and Their Relevance to a Liberalised Independent Judiciary,' in P. M Walubiri (ed.), *Uganda*: *Constitutionalism at the Crossroads* (Kampala: Uganda Law Watch, 1998).

A. Watson, *Legal Transplants*: *An Approach to Comparative Law*, reprinted 1993 (Edinburgh: Scottish Academic Press, 1974).

R. Cryer, H. Friman D. Robinson and E. Wilmshurst, *An Introduction to International Criminal Law and Procedure* (New York, Cambridge University Press, 2007).

K. Wiredu, *Conceptual Decolonisation in African Philosophy*: *Four Essays*, (Ibadan: Hope Publications, 1995).

A. Sanders and R. Young, *Criminal Justice* (Oxford: Oxford University Press, 2007)

S. Zappala, 'Rights of the Accused,' in A. Cassese, P. Greta and J. Jones (eds.), *The Rome Statute of the International Criminal Court- A Commentary Vol*. *II* (Oxford: Oxford University Press, 2002).

S. Zappala, *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2003).

Periodicals

P. Akhavan, 'The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court', (2005) 99 (2) *American Journal of International Law* 403-421.

P. Akhavan, 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment', (1996) 90 (3) *American Journal of International Law* 501-510.

A. Allot, 'Judicial precedent in Africa revisited', (1968) 12 *Journal of African Law* 3-31.

J. Almqvist, 'The Impact of Cultural Diversity on International Criminal Proceedings', (2005) *Journal of International Criminal Justice* 1-20.

K. Ambos, ''International Criminal Procedure: "Adversarial" "Inquisitorial" or mixed?', (2003) 3 *International Criminal Law Review* 1-37.

C. Aptel, 'Some innovations in the statute of the Special tribunal for Lebanon', (2007) 5 *Journal of International Criminal Justice* 1107-1124.

K. P Apuuli, 'The International Criminal Court (ICC) And the Lord's Resistance Army (LRA) Insurgency in Northern Uganda', (2004) 15 *Criminal Law Forum* 391-409.

K. P Apuuli, 'The ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospects for Northern Uganda', (2006) 4 (1) *Journal of International Criminal Justice* 179-187.

A. Ashworth, 'Responsibilities, Rights and Restorative Justice', (2002) 42 (3) *British Journal of Criminology* 578-595.

D. Smit and A. Ashworth, 'Disproportionate Sentences as Human Rights Violations', (2004) 67 (4) *Modern Law Review* 451-560.

M. Baderin, 'Recent Developments in the African Regional Human Rights System', (2005) 5 (1) *Human Rights Law Review* 117-149.

E. K Baines, 'The Haunting of Alice: Local approaches to Justice and Reconciliation in Northern Uganda', (2007) 1 *The International Journal of Transitional Justice* 91-114.

B. Baker, 'Popular justice and policing from bush war to democracy: Uganda 1981-2004', (2004) 32 (4) *International Journal of Sociology of Law* 333-348.

M. C Bassiouni, 'International Recognition of Victim's Rights', (2006) 6 (2) *Human Rights Law Review* 203-279.

M. C Bassiouni 'Human Rights in the Context of Criminal Justice: Identifying International Protections and Equivalent Protections in National Constitutions', (1992-1993) 3 *Duke Journal of Comparative and International Law* 235-298.

M. Bayles, 'Principles for legal procedure', (1986) 5 *Law and Philosophy* 33-57.

G. Bekker, 'The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States', (2007) 51 (1) *Journal of African Law* 151- 172.

E. G Bello, 'The African Charter on Human and Peoples' Rights: A Legal Analysis', (1985-V) Vol. 194 *Recueil des Cours*, 9-268.

F. von Benda-Beckmann, 'Law out Of Context: A Comment on the Creation of Traditional Law Discussion', (1984) 28 (1&2) *Journal of African Law* 28-33.

T. W Bennet, 'Human Rights and the African Cultural Tradition', (1993) 22 *Transformation* 30-40.

T. W Bennet, 'The Compatibility of African Customary Law and Human Rights', (1991) *Acta Juridica* 18-35.

S. Beresford, 'Unshackling the Paper Tiger: The Sentencing Practices of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda', (2001) 1 *International Criminal Law Review* 33-90.

H. Bisimba, 'Perspectives on Tanzania's non formal systems of justice', (2002) 8 (1) *East African Journal of Peace and Human Rights* 83-96.

N. Guibert and T. Blumenstock, 'The First Judgment of the Special Court for Sierra Leone: A Missed Opportunity?' (2007) 6 *The Law and Practice of International Courts and Tribunals* 367-391.

G. Boas, 'Creating Laws of Evidence for International Criminal Law: The ICTY and the Principle of Flexibility', (2001) 12 (1) *Criminal Law Forum* 41-90.

M. Bohlander, 'A Fool for a Client-Remarks on the Freedom of Choice and Assignment of Counsel at the International Criminal Tribunal for the former Yugoslavia', (2005) 16 (2) *Criminal Law Forum* 159-173.

C. Himonga and C. Bosch, 'The Application Of African Customary Law Under The Constitution Of South Africa: Problems Solved Or Just Beginning?'(2000) 117 (2) *South African Law Journal* 306-341.

S. Bourgon, "Procedural Problems hindering Expeditious and Fair Justice", (2004) 2 (2) *Journal of International Criminal Justice* 526-532.

J. Braithwaite, "Standards for Restorative Justice", (2002) 42 (3) *British Journal of Criminology* 563-577.

R. A. Bush, 'Modern Roles for Customary Justice: Integration of Civil Procedure in African Courts', (1974) 26 (5) *Stanford Law Review* 1123-1159.

D. Turns and C. Byron, 'The Preparatory Commission for the International Criminal Court', (2001) 50 (2) *International and Comparative Law Quarterly* 420-435.

C. A. Odinkalu and C. Christensen, 'The African Commission on Human and Peoples' Rights: the Development of its Non-State Communications Procedures', (1998) 20 *Human Rights Quarterly* 235-280.

J. A. M Cobbah, 'African Values and the Human Rights Debate: An African Perspective', (1987) 9 *Human Rights Quarterly* 309-331.

J. Cockayne, 'Hybrid Mongrels? Internationalised War Crimes Trials as Unsuccessful Degradation Ceremonies', (2005) 4 *Journal of Human Rights* 455-473.

A. T. Cole, 'The Special Court for Sierra Leone: Conceptual Concerns and Alternatives', (2001) 1 (1) *African Human Rights Journal* 107-126.

R. Cryer, 'A "Special Court" for Sierra Leone', (2001) 50 (2) *International Comparative Law Quarterly* 435-446.

M. Damaska, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study', (1973) 121 *University of Pennsylvania Law Review* 506-589.

M. Damaska, 'Structures of Authority and Comparative Criminal Procedure', (1975) 84 (3) *Yale Law Journal* 480-544.

M. Damaska, 'Assignment of counsel and Perceptions of Fairness', (2005) 3 (1) *Journal of International Criminal Justice* 3-8.

C. DeFrancia, 'Due Process in International Criminal Courts: Why Procedure matters', (2001) 87 *Virginia Law Review* 1381-1439.

L. Dickinson, 'The Promise of Hybrid Courts', (2003) 97 (2) *American Journal of International Law* 295- 309.

L. Dickinson, 'The Relationship between Hybrid Courts and International Courts: The Case of Kosovo', (2003) 37 (4) *New England Law Journal* 1059-1072.

C. R. M Dlamini, 'The role of customary Law in meeting social needs', (1991) *Acta Juridica* 71-85.

J. Donnelly, 'The Relative Universality of Human Rights', (2007) 29 (2) *Human Rights Quarterly* 281-306.

B. K Dougherty, 'Right-Sizing International Criminal Justice: The Hybrid Experiment at the Special Court for Sierra Leone', (2004) 80 (2) *International Affairs* 311-328.

J. H Driberg, 'Primitive Law in Eastern Africa', (1928) 1 (1) *Africa*: *Journal of the International African Institute* 63-72.

J. H Driberg, 'The Status of Women among the Nilotics and Nilo-Hamitics', (1932) 5 *Africa: Journal of the International African Institute* 404-421.

J. H Driberg, 'The African Concept of Law', (1934) 16 (4) *Journal of Comparative Legislation and International Law* 230-245.

O. M. Ejidike, 'Human Rights in the Cultural Traditions and Social Practice of the Igbo of South-Eastern Nigeria', (1999) 43 *Journal of African Law* 71-98.

L. T Ekirikubinza, 'The Judiciary and Enforcement of Human Rights: Between Judicial Activism and Judicial Restraint', (2002) 8 (2) *East African Journal of Peace and Human Rights* 145-173.

T. O Elias, 'Colonial Courts and the Doctrine of Judicial Precedent', (1955) 18 *Modern Law Review* 356 -370.

E. E Evans-Pritchard, 'Nilotic Studies', (1950) 80 *Journal of the Royal Anthropological Institute of Great Britain and Ireland* 1-6.

J. Fierens, 'Gacaca Courts: Between Fantasy and Reality', (2005) 3 (4) *Journal of International Criminal Justice* 896-916.

M. Freely, 'Perspectives on Plea Bargaining', (1979) 13 *Law and Society Review* 199-209.

M. Frulli, 'The Special Court for Sierra Leone: Some Preliminary Comments', (2000) 11 (4) *European Journal of International Law* 857-869.

I. T Gaparayi, 'Justice and Social Reconstruction in the aftermath of Genocide in Rwanda: An evaluation of the possible role of the Gacaca tribunal', (2001) 1 *African Human Rights Law Journal* 78-106.

A. Garapon, 'Three Challenges for International Criminal Justice', (2004) 2 (3) *Journal of International Criminal Justice* 716-726.

M. Harmon and F. Gaynor, "Ordinary Sentences for Extraordinary Crimes", (2007) 5 (3) *Journal of International Criminal Justice* 683-712.

F. M Sekandi and C. Gitta, 'Protection of Fundamental Rights in the Uganda Constitution', (1994) 26 *Columbia Human Rights Law Review* 191-214.

R. Gittleman, 'The African Charter on Human Rights: A Legal Analysis', (1982) 22 *Virginia Journal of International Law* 667-714.

R. Goldstone, 'The International Tribunal for the Former Yugoslavia: A Case Study in Security Council Action', (1995) 6 *Duke Journal of Comparative and International Law* 5-10.

S. Greer, 'What's wrong with the European Convention on Human Rights?' (2008) 30 *Human Rights Quarterly* 680-702.

C. T Griffiths, 'Sanctioning and Healing: Restorative Justice in Canadian Aboriginal Communities', (1996) 20 (2) *International Journal of Comparative and Applied Criminal Justice* 311-314.

C. K Hall, 'The Fifth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court', (1998) 92 (2) *American Journal of International Law* 331-339.

D. Weissbrodt and M. Hallendorff, 'Travaux Preparatoires of the Fair Trial Provisions-Articles 8 to 11-of the Universal Declaration of Human Rights', (1999) 21 *Human Rights Quarterly* 1061-1096.

M. Hansungule, 'The African Charter on Human and Peoples' Rights: A Critical review', (2000) 8 *African Yearbook of International Law* 315-316.

R. Henham, 'Human Rights, Due Process and Sentencing', (1988) 38 (4) *British Journal of Criminology* 592-610.

R. Henham, 'Some Issues For Sentencing in the International Criminal Court', (2003) 52 (1) *International Comparative Law Quarterly* 81-114.

R. Henham, 'The Philosophical Foundations of International Sentencing', (2003) 1 (1) *Journal of International Criminal Justice* 64-85.

R. Henham, 'Procedural Justice and Human Rights in International Sentencing', (2004) 4 (2) *International Criminal Law Review* 185-210.

D. Hunt, 'The International Criminal Court: High Hopes, 'Creative Ambiguity' and an Unfortunate Mistrust in International Judges', (2004) 2 (1) *Journal of International Criminal Justice* 56-70.

P. Ikuenobe, 'Moral Education and Moral Reasoning in Traditional African Cultures', (1998) 32 (1) *Journal of Value Inquiry* 25-42.

K. Daly and R. Immagirgeon, 'The Past, Present and Future of Restorative Justice: Some Critical Reflections', (1998) 1 *Contemporary Justice Review* 21-45.

J. M. N Kakooza, 'The Application of Customary Law in Uganda', (2003) 1 (1) *Uganda Living Law Journal* 23-42.

J. M Kamatali, 'The Challenge Of Linking International Criminal Justice And National Reconciliation: The Case Of The ICTR', (2003) 16 (1) *Leiden International Journal* 115-133.

M. P Scharf and A. Kang, 'Errors and Missteps: Key Lessons the Iraqi Special Tribunal can learn from the ICTY, ICTR, and SCSL', (2005) 38 *Cornell International Law Journal* 911-948.

L. M Keller, 'Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms', (2008) 23 *Connecticut Journal of International Law* 209-279.

L. M Keller, 'Seeking Justice at the International Criminal Court: Victim's Reparations', (2007) 29 *Thomas Jefferson Law Review* 189-218.

H. Kelsen, 'Will The Judgment At Nuremberg Constitute A Precedent?', (1947) 1 (2) *International Law Quarterly* 153- 171.

L. Khadiagala, 'The Failure of Popular Justice in Uganda: Local Councils and Women's Property Rights', (2001) 32 (1) *Development and Change* 55-76.

P. Kirchloff, 'Kinship Organization: A study of Terminology', (1932) 5 *Africa*: *Journal of the International African Institute* 184-191.

N. J Kritz, 'Coming to terms with atrocities: A review of Accountability mechanisms for mass violations of human rights', (1996) 59 (4) *Law and Contemporary Problems* 127-152.

M. Langer, 'From Legal Transplants to Legal Translations: The Globalization of Plea bargaining and the Americanization Thesis in Criminal Procedure', (2004) 45 (1) *Harvard International Law Journal* 1-64.

R. S Lee, 'The Rwanda Tribunal', (1996) 9 (1) *Leiden Journal of International Law* 37-61.

J. Lewin, 'Native Courts and British Justice in Africa', (1944) 14 *Africa*: *Journal of the International African Institute* 448-453.

F. Viljoen and L. Louw, 'The Status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation', (2004) 48 (1) *Journal of African Law* 1-22.

D. Mabirizi, 'Some aspects of Makerere's legal Education in Development', (1986) 66 *Third World Legal Studies* 63-78.

N. MacCormick, 'Argumentation and Interpretation in Law', (1995) 9 (3) *Argumentation* 467-480.

J. N Maogoto, 'The International Criminal Tribunal for Rwanda: A Paper Umbrella in the Rain? Initial Pitfalls and Brighter Prospects', (2004) 73 *Nordic Journal of International Law* 187-221.

H. Marriott, 'The Secret Societies of West Africa', (1899) 29 *Journal of the Anthropological Institute of Great Britain and Ireland* 21-27.

A. Mayanja, 'The Government's Proposals for a New Constitution of Uganda', (1967) 32 *Transition* 20-25.

A. Van Der Mei, 'The New African Court on Human and Peoples' Rights: Towards an Effective Human Rights Protection Mechanism for Africa?', (2005) 18 (1) *Leiden Journal of International Law* 113-129.

G. Mettraux, 'The 2005 Revision of the Statute of the Iraqi Special Tribunal', (2007) 5 (1) *Journal of International Criminal Justice* 1-7.

A. Meyerstein, 'Between Law and Culture: Rwanda's Gacaca and Postcolonial Legality', (2007) 32 (2) *Law and Social Inquiry* 467-508.

N. Miller, 'An International Jurisprudence? The Operation of "Precedent" Across International Tribunals', (2002) 15 *Leiden Journal of International Law* 483-526.

L. A Mistelis, 'Regulatory Aspects: Globalization, Harmonisation, Legal Transplants and Law Reform-Some Fundamental Observations', (2000) 34 *International Law* 1055-1069.

H. O Mogensen, 'The resilience of *Juok*: Confronting suffering in Eastern Uganda', (2002) 72 (3) *Africa*: *Journal of the International African Institute* 420-436.

M. Bagaric and J. Morss, 'International Sentencing Law: In search of a Justification and Coherent Framework', (2006) 6 (2) *International Criminal Law Review* 191-255.

E. Mose, 'Main Achievements of the ICTR', (2005) 3 (4) *Journal of International Criminal*

Justice 920-943.

Z. Motala, 'Human Rights in Africa: A Cultural, Ideological and Legal Examination', (1989) 12 (2) *Hastings International and Comparative Law Review* 373-410.

R. B Mqeke, 'Customary law and Human Rights', (1996) 113 (2) *South African Law Journal* 364-369.

J. C Mubangizi, 'Towards A New Approach to the Classification of Human Rights with Specific Reference to the African Context', (2004) 4 (1) *African Human Rights Journal* 93-107.

J.C Mubangizi, 'The Protection of Human Rights Awareness in Uganda: Public awareness and perceptions', (2005) 3 (1) *African Journal of Legal Studies* 166-186.

L. Mulcahy, 'Architects of Justice: The Politics of Court Room Design', (2007) 16 (3) *Social and Legal Studies* 383-403.

J. Mujuzi, 'An Analysis of the Approach to the Right to Freedom from Torture', (2006) 6 *Africa Journal of Human Rights* 423-441

R. Murray, 'International Human Rights: Neglect of perspectives from African Institutions', (2006) 55 *International and Comparative Law Quarterly* 193-204.

M. Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An evaluation of the language of duties', (1995) 35 *Virginia Journal of International Law* 339-380.

M. Mutua, 'The African Human Rights System in a Comparative Perspective: The Need for Urgent Reformulation', (1993) 5 *Legal Forum* 31.

M. Mutua, 'The African Human Rights Court: A Two-Legged Stool?'(1999) 21 *Human Rights Quarterly* 342-363.

D. W Nabudere, 'Towards the Study of Post Traditional Systems of Justice in the Great Lakes Region of Africa', (2002) 8 (1) *East African Journal of Peace and Human Rights* 1-40.

D. W Nabudere, 'Politics And Constitution Making in Post Colonial Uganda', (2004) 2 (1) *Uganda Living Law Journal* 1-30.

T. Nahimana, 'The Burundi Bashingantahe Institution', (2002) 8 (1) *East African Journal for Peace and Human Rights* 111-120.

K. D Magliveras and G. J Naldi, 'The African Union- A New Dawn for Africa?' (2002) 51 (2) *International Comparative Law Quarterly* 415-425.

S. Negri 'The Principle of "Equality of Arms" and the Evolving law of International Criminal Procedure', (2005) 5 (4) *International Criminal Law Review* 513-571.

G. Nice, 'Trials of Imperfection', (2001) 14 (2) *Leiden Journal of International Law* 383-397.

S. M. H Nouwen, 'Hybrid courts: The Hybrid Category of a New Type of International Crimes Courts', (2006) 2 (2) *Utrecht Law Review* 190-214.

F. Nsanzuwera, "The ICTR Contribution to National Reconciliation", (2005) 3 (4) *Journal of International Criminal Justice* 944-949.

D. D. N Nsereko, 'The Role Of The International Criminal Tribunals In The Promotion Of Peace And Justice: The Case Of The International Criminal Court', (2008) 19 *Criminal Law Forum* 373-393.

D. D. N Nsereko, 'The International Criminal Court: Jurisdictional and Related Issues', (1999) 10 (1) *Criminal Law Forum* 87-210.

P. Nyaba, 'The Grassroots Peacemaking in South Sudan', (2002) 8 (1) *East African Journal of Peace and Human Rights* 97-110.

C. A Odinkalu, 'African Commission on Human and Peoples' Rights: Recent Cases', (2001) 1 (1) *Human Rights Law Review* 97-110.

C. A Odinkalu, 'Africa's Regional Human Rights System: Recent Developments and Jurisprudence', (2002) 2 (1) *Human Rights Law Review* 99-116.

C. A Odinkalu, 'Back to the future: The imperative of prioritizing for the protection of human rights in Africa', (2003) 47 *Journal of African Law* 1-37.

B. J Odoki, 'Reforming the Sentencing system in Uganda', (2003) 1 (1) *The Uganda Living Law Journal* 1-22.

B. J Odoki, 'Reducing delay in the administration of justice: the case of Uganda', (1994) 5 (1) *Criminal Law Forum* 57-89.

B. O Okere, 'The protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems', (1984) 6 (2) *Human Rights Quarterly* 141-159.

O. Oko, 'Confronting Transgressions of Prior Military Regimes: Towards A More Pragmatic Approach', (2003) 11 *Cardozo Journal of International and Comparative Law* 89-142.

J. Oloka–Onyango, 'Constitutional Transition in Museveni's Uganda: New Horizons or another false Start?' (1995) 39 (2) *Journal of African Law* 156-172.

E. Orucu, 'Law as Transposition', (2002) 51 (2) *International and Comparative Law Quarterly* 205-233.

M. Pack, 'Developments at the Special Court for Sierra Leone', (2005) 4 (1) *The Law and Practice of International Courts and Tribunals* 171-192.

J. M Pasqualucci, 'The Evolution of International Indigenous Rights in the Inter American Human Rights System', (2006) 6 (2) *Human Rights Law Review* 281-322.

J. R Quinn, 'Social Reconstruction in Uganda: the Role of Customary Mechanisms in Transitional Justice', (2007) *Human Rights Review* 389-407.

S. Razack, 'What is to be gained by looking white people in the eye: culture, race and gender in cases of sexual violence', (1994) 19 *Signs: Feminism and the Law* 894-923.

L. Reydams, 'The ICTR Ten Years On: Back to the Nuremberg Paradigm?' (2005) 3 (4) *Journal of International Criminal Justice* 977-988.

J. Hemptinne and F. Rindi, 'ICC Pre-Trial Chamber allows victims to participate in the

investigations phase of proceedings', (2006) 4 (2) *Journal of International Criminal Justice* 342-350.

A. D Roberts, 'The Sub Imperialism of the Baganda', (1962) 3 (3) *Journal of African History* 435-450.

J. Sarkin, 'The Tension between Justice and Reconciliation in Rwanda; Politics, Human Rights, Due Process and the Role of the Gacaca Courts In Dealing with the Genocide', (2001) 45 (2) *Journal of African Law* 143-172.

E. Sawyer, 'Remove or Reform? A Case for (Restructuring) Chiefdom Governance in Post Conflict Sierra Leone', (2008) 107 (428) *African Affairs* 387-403.

W. A Schabas, 'Sentencing by International Tribunals: A Human Rights Approach', (1999) 7 (2) *Duke Journal of Comparative and International law* 461- 517.

W. A Schabas, 'Conjoined Twins of Transitional Justice-The Sierra Leone Truth and Reconciliation Commission and the Special Court', (2004) 2 (4) *Journal of International Criminal Justice* 1082-1099.

W. A Schabas, 'Genocide Trials and Gacaca Courts', (2005) 3 (4) *Journal of International Criminal Justice* 879-895.

W. A Schabas, 'International Justice For International Crimes: An Idea Whose Time Has Come,' (2006) 14 (4) *European Review* 421-439.

R. Seidman, 'Law and Economic Development', (1996) 999 *Wisconsin Law Review* 1027.

C. Rose and F. Sekandi, 'The pursuit of transitional justice and African traditional values: a clash of civilisations-the case of Uganda', (2007) (7) (4) *Sur International Journal on Human Rights* 101-125.

M. Senyonjo, 'The Domestic Protection and Promotion of Human Rights under the 1995 Constitution', (2002) 20 (4) *Netherlands Quarterly of Human Rights* 445-483.

M. Senyonjo, 'The International Criminal Court and the Lord's Resistance Army leaders: Prosecution or Amnesty?' (2007) LIV *Netherlands International Law Review* 51-80.

M. Senyonjo, 'Culture and the Human Rights of Women in Africa: Between Light and Shadow', (2008) 5 (1) *Journal of African Law* 39-67.

O. Bekou and S. Shah, 'Realising the Potential of the International Criminal Court: The African Experience', (2006) 6 (3) *Human Rights Law Review* 499-544.

G. K Sluiter, 'The Law of International Criminal Procedure and Domestic War Crimes Trials', (2006) 6 (4) *International Criminal Law Review* 605-635.

G. K Sluiter, 'Due Process and Criminal Procedure in the Cambodian Extraordinary Chambers', (2006) 4 (2) *Journal of International Criminal Justice* 314-326.

D. V. Zyl Smit, 'Life Imprisonment as an Ultimate Penalty in International Law: A Human Rights Perspective', (1999) 9 *Criminal Law Forum* 5-54.

D. V. Zyl Smit, 'Punishment and Human Rights in International Criminal Justice', (2002) 2 (1) *Human Rights Law Review* 1-17.

D. V. Zyl Smit, 'International Imprisonment', (2005) 54 *International and Comparative Law Quarterly* 357-386.

C. L Sriram, 'Wrong sizing International justice? The Hybrid Tribunal in Sierra Leone', (2005-2006) 29 (3) *Fordham International Law Journal* 472-506.

C. Stahn, 'Between Harmonization and Fragmentation: New Groundwork on Ad Hoc Criminal Courts and Tribunals', (2006) 19 (2) *Leiden Journal of International Law* 567-577.

N. Sudarkasa, 'African and Afro-American Family Structure: A Comparison', (1980) 11 *Black Scholar* 37-60.

G. Teubner, 'Legal Irritants: Good faith in British Law or how unifying law ends up in new divergences', (1998) 61 (1) *Modern Law Review* 11-32.

G. Townsend, 'Current Developments in the Jurisprudence of the International Criminal Tribunal for Rwanda', (2005) 5 (1) *International Criminal Law Review* 147-160.

X. Tracol, 'The Precedent of Appeals Chambers Decisions in the International Criminal Tribunals', (2004) 17 (1) *Leiden Journal of International Law* 67-102.

L. D Tully, 'Human Rights Compliance and the Gacaca Jurisdictions in Rwanda', (2003) 26 *British Columbia International and Comparative Law Review* 385- 414.

J. I Turner, 'Nationalising International Criminal Law: The International Criminal Court as a Roving Mixed Court', (2005) 41 *Stanford Journal of International Law* 1-52.

N. J Udombana, 'Can the Leopard change its spots? The African Union Treaty and Human Rights', (2002) 17 *American University International Law Review* 1177-1261.

B. H Weston, 'Human Rights', (1984) 6 *Human Rights Quarterly* 257-283.

W. Burke-White, 'A Community of Courts: Towards a System of International Criminal Law Enforcement', (2002) 24 (1) *Michigan Journal of International Law,* 1 -101.

R. Murray and S. Wheatley, 'Groups and the African Charter on Human and Peoples' Rights', (2003) 25 *Human Rights Quarterly* 213-236.

R. May and M. Wierda, 'Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha', (1998-1999) 37 *Columbia Journal of Transnational Law* 725-766.

S. Williams and H. Woolaver, 'The Role of the Amicus Curiae before International Tribunals', (2006) 6 *International Criminal Law Review* 151-189.

Q. Wright, 'Due Process and International Law (1946) 40 (2) *American Journal of International Law* 398-406.

D. Shraga and R. Zacklin, 'The International Criminal Tribunal for Rwanda', (1996) 7 (4) *European Journal of International Law* 501-518.

R. Zacklin, 'The Failings of Ad Hoc International Tribunals', (2004) 2 (2) *Journal of International Criminal Justice* 541-545.

L. Zedner, 'Reparation and Retribution: Are They Reconcilable?' (1994) 57 (2) *Modern Law*

Review 228-250.

M. Zeidy, 'The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC', (2005) 5 (1) *International Criminal Law Review* 83-119.

Other documents (selected)

International documents

American Convention on Human Rights, (1969) O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123

Arab Charter on Human Rights reprinted in (2005) 12 *International Human Rights Report*s, 893

Decisions taken by the Preparatory Committee at its Session held from 5-15 August 1997, U.N. Doc. A/AC.249/1997/L.8/Rev.1

Draft Statute for the International Criminal Court, U.N Doc. A/CONF.183/2/Rev.1,1994

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ETS No.5) 213 U.N.T.S. 222

Report Of The International Law Commission On The Work Of Its Forty-Sixth Session, 2 May-22 July 1994 GOAR forty-ninth session, supplement 10 (A/49/10)

Report of the Preparatory Committee on the Establishment of an International Criminal Court: U.N. Doc.A/CONF.183/2Add.1 April 14, 1988

Report of the Inter-Sessional Meeting from 19-30 January 1998 in Zutphen, The Netherlands, U.N Doc.A/AC.249/1998/L.13, pp. 114-115

Report of the Inter-Sessional Meeting from 19-30 January 1998 in Zupten, The Netherlands, UN Doc. A/AC.249/1998/L 13 (1998)

Final Report of the Commission of Experts Established Pursuant To Security Council Resolution 935(1994) U.N. Doc. S/1994/1405(1994). (ICTR)

Report of the Secretary General on the establishment of a Special Court for Sierra Leone U.N.Doc.S/2000/915

Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808 (1993) of 3rd May 1993 S/25704.

Report on the Special Court Rules of Procedure and Evidence Seminar, Sierra Leone Bar Association, Freetown, 3/12/2002.

United Nations *Basic Principles on the use of Restorative Justice Programmes in Criminal Matters*: E/CN.15/2002/5/Add.1.

United Nations *Declaration on the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms*: General Assembly Res 53/144, 8 March 1999

United Nations *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*: G.A Assembly Resolution 40/34 29 November 1985

Vienna Convention on the Law of Treaties, Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969).

Theses

S. Birungi, *The Law governing Sentencing and Punishment in Uganda: A case for Reform*, Unpublished LLB Thesis, Makerere University, Uganda (1998).

K. P Apuuli, *Procedural Due Process Safeguards in the Prosecution of Genocide Suspects: The Case for the International Criminal Tribunal for Rwanda (ICTR), National Genocide Trials and the Gacaca Courts in Rwanda*, University of Sussex, UK, unpublished D. Phil Thesis, (2006).

F. Kayitare, *Respect of the right to a fair trial in indigenous African Criminal justice systems: the case of Rwanda and South Africa*, Unpublished LLM thesis, University of Ghana (2004).

S. Rodella, *Justice, Peace and Reconciliation in Post Conflict Societies: The case of Sierra Leone,* Unpublished Masters of Arts in Law and Diplomacy Thesis, Tufts University, USA (2003).

Government reports, policies and other documents

Colonial Office reports and Command papers

Report Of The Commission Of Inquiry Into The Administration Of Justice In Kenya, Uganda And The Tanganyika Territory In Criminal Matters, (Bushe Commission), (London, HMSO, 1934) Cmnd 4623.

Colonial Office, *Report of the Uganda Constitutional Conference*, (HMSO London, 1961), Cmnd 1523.

Report of the Commission of Inquiry into disturbances in the Eastern province, (K. Benne and A. Loveridge Commission) (1960).

Government Reports

Government White Paper on the Report of the Commission of Inquiry and Government Proposals not Addressed by the Report of the Commission of Inquiry (*Constitutional Review*) (Kampala, 2004).

Justice, Law and Order Sector, *Criminal Justice Baseline Survey*, (Kampala: Justice, Law and Order Sector, 2002).

National Resistance Movement, *Ten Point Programme of NRM*, (NRM Publications, Kampala, 1985)

Report of the Commission of Inquiry (*Constitutional Review*): *Findings and Recommendations* (Sempebwa Commission) (Kampala, 10th December 2003).

Report of the Commission of Inquiry into the Local Government System, (Mamdani Commission) (Kampala, June 1987).

Tororo District Planning Office report (Tororo: District Planning Office, 2006).

Transitional Justice in Northern Uganda, Eastern Uganda and some parts of West Nile (Kampala: TERL Limited, 2007).

Uganda Bureau of Statistics and International Livestock Research Institute, *Where are the Poor? Mapping Patterns of Well-Being in Uganda* (Nairobi: Regal Press, Kenya Ltd, 2003).

Uganda Bureau of Statistics, *The 2002 Population and Housing Census, Population Composition* (Kampala: Uganda Bureau of Statistics, 2006).

Uganda Human Rights Commission Special Report *Human Rights and the Search for Peace in Karamoja*, (Kampala: Uganda Human Rights Commission, 2004).

Uganda Law Reform Commission, *Draft Study Report of the Laws on Sentencing* (Kampala: Uganda Law Reform Commission, September 2006).

Uganda Law Reform Commission, *Workshop Report on the Study for the Reform of Sentencing Legislation*, (Speke Resort, Munyonyo, Uganda, 27th-29th August 2003).

White Paper on the Report of the Commission of Inquiry and Government Proposals not addressed by the Report of the Commission of Inquiry (*Constitutional Review*) (Government of Uganda, 2004).

Research studies, Conference proceedings and Academic papers

G. Ajani, 'The role of Comparative law in the adoption of new codifications,' in *Italian National reports to the XVT International Congress of Comparative Law, Bristol* (Milano: Giuffre Editore, 1998).

D. Haile, 'Rwanda's Experiment in People's Courts (Gacaca) And the Tragedy of Unexamined Humanitarianism: A Normative/Ethical Perspective' Discussion Paper/2008.01, University of Antwerp.

E. Kamuhangire, 'African Traditional Methods in Rwanda: A Case Study of the Agacaca Method of Conflict Resolution amongst the Banyarwanda,' in *African Traditional Methods in Conflict Resolution, Reconciliation and Forgiveness, A Resource Handbook*, (Kampala, Centre for Conflict Resolution, 2000).

Nordic Consulting Group, *Survey of LC Courts and Legal Aid Providers Findings: Tororo district* (Kampala, Nordic Consulting Group 2006).

J. Ogik, *International Justice Systems: Linkages to National and Traditional Justice Systems*, a paper presented at the Freiderich Eibert Foundation and the Uganda Law Society workshop, Kampala: Hotel Africana, 8th February 2007.

J. Oloka-Onyango, 'Law, Custom and Access to Justice in Contemporary Uganda: A Conceptual and Analytical review', paper prepared for *New Frontiers of Social Policy* World Bank Conference, (Dar Es Salaam, 2005).

L. Hovil and J. R. Quinn, *Peace First, Justice Later: Traditional justice in Northern Uganda*, Refugee Law Project Working Paper No.17 (July 2005).

Report on the Regional Conference on Post-traditional Justice and Human Rights (2002) 8 (1) *East African Journal of Peace and Human Rights* 29-30.

H. C Rohne, 'International Jurisdiction and Reconciliation-Experiences from the ICTR', Max Planck Institute (April 2003).

P. Takirambudde (ed.) *The Individual under African Law,* (Proceedings of the first All Africa Law Conference October 11-16 1981, Kwasuluseni: University of Swaziland 1982).

B. Tshehla, *Traditional Justice in practice: a Limpopo case study*, ISS Monograph 115 (Pretoria: Institute for Security Studies, 2005).

T. Verhelst, 'Safeguarding African Customary Law: Judicial and Legislative Processes for Its Adaptation and Integration', Occasional Paper No.7, *African Conference on Local Courts and Customary law 94 (1963)*, (Los Angeles: University of California, 1968).

C. Reiger and M. Wierda, *The Serious Crimes Process in Timor-Leste: In Retrospect*, (The International Centre for Transitional Justice, March 2006).

Electronic Sources and websites

'African Commitments to Human rights' Chapter 6 on 'Access to justice', Paper 0584 ISS Institute of Security studies available at http://www.issafrica.org/pubs. (Visited on 27th October 2007)

Amnesty International, 'Uganda: Agreement and Annex on Accountability and Reconciliation Falls Short Of a Comprehensive Plan to End Impunity' (March 2008) AI Index: AF 59/001/2008 available at http://www.reliefweb.int/rw/RWB.NSF/db900SID/LRON-7CTEZN?OpenDocument (Visited on 16th June 2008).

A. M Anderson, *Restorative Justice, the African philosophy of Ubuntu and the Diversion of Criminal prosecution*. The document is available at http:// www.isrcl.org/Papers/Anderson.pdf . (Visited on 14th October 2008).

N. Grono and A. O`Brien, 'Justice in Conflict? The ICC and Peace Processes,' in N. Waddell and P. Clark (eds.), *Courting Conflict? Justice, Peace and the ICC in Africa* (Royal African Society, March 2008) available at http://www.royalafricansociety.org. (Visited on 16th June 2008).

Interrights Bulletin, *Regional Programmes*, Africa, 2004 available at http://www.interights.org/africa-programme/index.htm (Visited on 22nd May 2007).

Comments by President Museveni on 'LRA trials', BBC News available at http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/africa/7291274.stm. (visited on 12th March 2008).

D. Crane, Discussion Topic 12 "*Whose Justice Anyway*?" available at Grotian Moment Blog at http://www.law.case.edu/saddamtrial, (Visited on 12th October 2005).

Dakar Declaration and Recommendations available at: http://www.chr.up.acza/hr_docs/african/docs/achpr/achpr2.doc (Visited on 6th November 2007).

Report of the ILC on the work of its 46th Session 'Draft Statute for an International Criminal Court with commentaries' 1994 at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7_4_1994.pdf (Visited on 16th February 2009).

O. O Elechi, *Human rights and the African Indigenous Justice system*, paper delivered at the 18th International conference of the International Society for the Reform of Criminal Law, August 8-12 2004 (Montreal, Quebec). Available at http:// www.isrcl.org/Papers/2004/Elechi.pdf. (Visited on 10th November 2008).

Human Rights Watch/Africa, *We'll kill if you cry: Sexual Violence in the Sierra Leone Conflict* http:/hrw.org/reports/2003/sierraleone/sierleon0103.pdf 2003. (Visited on 9th July 2008).

ICC, arrest warrants, situations and *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* ICC-02/04-01/05 all available at http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200204/. (Visited on 11th March 2009).

Justice, Law and Order Sector, *A study on sentencing and offences legislation in Uganda*, Report 5 (Kampala: Justice, Law and Order Sector 2001) available at http://www.commonlii.org/ug/other/UGJLOS/list.html. (Visited on 4th February 2009).

Law N° 13/2004 *Relating to the Code of Criminal Procedure* [Rwanda] of 17 May 2004, Official Gazette of the Republic of Rwanda, Special No. of 30/07/2004. Available online in UNHCR Refworld at: http://www.unhcr.org/refworld/docid/46c306492.html. (Visited on 17 April 2009).

Liu Institute for Global Issues, *Roco Wat I Acoli, Restoring Relationships in Acoli-Land: Traditional approaches to Justice and Reintegration* September 2005 available at http://www.ligi.ubc.ca/page121.htm Visited on 28th June 2008.

G. MacCarrick, *The Right To A Fair Trial In International Criminal Law (Rules Of Procedure And Evidence In Transition From Nuremberg To East Timor)* at http:// www.islcl.org/Papers/2005/Maccarrick.pdf 2005. (Visited on 20th June 2008).

M. Mutua, *The African Human Rights System: A Critical Evaluation, 2000* available at http://www.hdr.undp.org/docs/publications/background_papers/MUTUA.PDF (Visited on 25th October 2005).

National Forum for Human Rights, *The Law People See*: *The Status of Dispute Resolution in the Provinces of Sierra Leone in 2002* available at http://www.sierra-leone.org/lawpeoplesee.pdf 2002 (Visited on 9th July 2008).

Penal Reform International, *Traditional and Informal Justice Systems and Access to Justice in Sub-Saharan Africa*, (London: Penal Reform International, 2000) available at http://www.gsdrc.org/docs/open/SSAJ4.pdf (Visited on 27th April 2007).

Report of the ILC on the Work of Its 46th Session 'Draft Statute for an International Criminal Court with commentaries' 1994 at

http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7_4_1994.pdf. (Visited on 16th February 2009).

Rev. A. M SamForay messages at of the CDF Defence Fund, available at www.lumleybeach.com/wwwboard/messages/191.html. (Visited on 19th July 2007).

Special Court for Sierra Leone, Court case database at www.sc-sl.org/CDF.html and www.sc-sl.org/AFRC.html. (Visited on 10th March 2009).

B. Tusasirwe, *The East African Community (EAC) and Constitutional Development in 2002* available at http://www.kituochakatiba.co.ug/publication.htm (Visited on 14th November 2007).

Uganda Law Society Register available at http://www.uls.or.ug/pdf/Members_Directory.pdf (Visited on 5th June 2008).

United Nations Office on Drugs and Crime, *United Nations Handbook on restorative justice programmes*, Criminal Justice Handbook series (United Nations, New York 2006), available at http://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf (Visited on 27th May 2007).

M. Otim and M. Wierda, 'Justice at Juba: International Obligations and Local Demands in Northern Uganda' in N. Waddell and P. Clark (eds.), *Courting Conflict? Justice, Peace and the ICC in Africa* (Royal African Society, March 2008) available at http://www.royalafricansociety.org. (Visited on 16th June 2008).

T. Perriello and M. Wierda *The Special Court for Sierra Leone under Scrutiny*, Prosecution Case Studies, International Centre for Transitional Justice, March 2006 available at http://www.ictj.org/static/Prosecutions/Sierra.study.pdf. (Visited on 27th February 2009).

G. R Woodman *Customary Law in Common Law Systems* available at http://www.vanuatu.usp.ac.fj/sol_adobe_documents/usp%20only/customary%20law/woodman.pdf. (Visited on 20th April 2009).

Newspapers

Daily Monitor, (Kampala 12th January 2009).
Daily Monitor, (Kampala 18th February 2008).
Daily Monitor, (Kampala 30th May 2008).
Daily Monitor, (Kampala 3rd June 2008).
Daily Monitor, (Kampala 24th October 2006).
Sunday Monitor, (Kampala 25th May 2008).
Sunday Monitor, (Kampala 30th July 2006)
New Vision, (Kampala 10th April 2008).
New Vision, (Kampala 10th December 2008).
New Vision, (Kampala 17th May, 2007).
New Vision, (Kampala 28th June 2006).
New Vision, (Kampala 28th August 2006).
New Vision, (Kampala 3rd October 2006).

APPENDIX 1

RESEARCH METHODS

The research design

The objective of the thesis is to seek to reconcile international sentencing procedural law with values of localized communities through an application of procedural rights. To achieve this objective, I use two approaches. Through these two approaches, the capacity of the international system to integrate aspects of the traditional normative system will become clear.

The first approach involves a legal analysis of the international and traditional sentencing frameworks to examine the tensions between them in light of human rights imperatives. The second involves the use of empirical methods. I presented the results of an empirical study I conducted in 2006 of clan courts of the Jopadhola ethnic group in Tororo district (Eastern Uganda). The focus is on the clan courts (*Koti* in the local language Dhupadhola) of the Jo-Gem (or Jo-Gemi)[1] and Morwa Guma Malasang (hereafter 'Morwa Guma') clans in Budama North constituency of West Budama County in the 5 sub counties of Kirewa, Kisoko, Petta, Paya and Nagongera. The choice of these clans was based on my interest in comparing contemporary sentencing practices of two clans with distinct origins. Of the 54 registered clans of the Jopadhola the Jo-Gem clan is smaller and newly created while the Morwa Guma clan is large and live in every part of the county. Both clans continue to apply traditional clan law using traditional restorative process.

Justification for the research design

The choice of methodology arises from the complexity of issues (both theoretical and methodological) in this type of restorative justice research.[2] These complexities in relation to clan courts include: dearth of archival documentation both academic and non academic, poor electronic communication, low levels of literacy in rural areas and the holistic context within which the sentencing process is addressed. This necessitates application of several research methods in a process known as triangulation. Triangulation is appropriate because each method has strengths and weaknesses. A research design should therefore adopt more than one research method to compensate for

[1] The names are used interchangeably with Jo-Gemi being the official spelling in historical and anthropological texts. I use Jo-Gem in this thesis.
[2] C. T Griffiths (1996) *op cit* 311-314.

limitations in each approach.[3] To this end, three qualitative research methods were used: archival research; interviews both unstructured and semi structured, and trial simulation. The three methods are discussed next.

Archival research

Archival research techniques complemented other methods of information gathering. My methodological starting point was to examine available primary and secondary material including legislation, government publications, white papers, law reports, clan courts records, judgments of superior courts of record,[4] and widely circulated local daily newspapers: *The New Vision* and *Daily Monitor*. I also examined books, periodicals, legal encyclopaedias and mimeographs. These sources provided insight into the doctrinal and historical aspects of the human rights framework in sentencing practice.

However, little contemporary academic work exists on the sentencing practices of clan courts in Uganda. For example, there is only one law undergraduate study on sentencing legislation and no PhD or Master's theses in law on clan court practices. There are two government studies on sentencing in Uganda.[5] Equally, there is a lack of statistical information and other quantitative data on sentencing in clan courts because typically, these courts do not keep statistics or up to date court records.[6] In the case of Jopadhola clan courts, the only records availed to me were from Namwaya Saza court of the Morwa Guma clan.[7] I therefore relied on earlier historical and anthropological work done among the Jopadhola. In particular, my research draws on the works of B. Ogot a historian;[8] F. Burke a social scientist[9] and A. Oboth-Ofumbi a Jopadhola elder whose work is the only indigenous documentation of Jopadhola traditions and culture.[10] Thus,

[3] E. Babbie, *The Practice of Social Research* 11th edition (California: Thomson Wadsworth Publishing Company, 2007) 113.
[4] The superior courts are: the High Court, Court of Appeal, Constitutional Court and Supreme Court of Uganda.
[5] S. Birungi, Unpublished Thesis (1998) *op cit;* ULRC *Draft Study Report on Sentencing* (2006) *op cit* and JLOS *Study on sentencing* (2001) *op cit*. I conducted a search (2006, 2008) at the Main Library, School of Law and Institute of Social Research at Uganda's oldest research university of Makerere.
[6] Any studies on clan courts are among the Acoli and give largely anecdotal evidence on their trial procedures.
[7] There were four judgements from the Namwaya Saza court: 1 on land and 3 criminal cases from 2002-2006. Judgments were in Dhupadhola with one translated into English.
[8] B. A. Ogot, *History of the Southern Luo: Vol.1 Migration and Settlement 1500-1900* (Nairobi: East African Publishing House, 1967).
[9] F. Burke, *Local Government and Politics in Uganda* (New York: Syracuse University Press, 1964).
[10] A. Oboth-Ofumbi, *Lwo (Ludama) Uganda: History and Customs of the Jo Padhola* (Nairobi: Eagle Press, 1960).

given the limited insights available from a doctrinal or statistical study, it was necessary to use interviews to fill in the gaps.

Interviews

Unstructured and semi–structured interviews were used rather than survey questionnaires, because interviews attain a higher response rate than any survey technique and generate better quality data.[11] Both types of interviews have the advantage that the interviewer is able to probe further any issues raised.[12]

Unstructured interviews are very useful because they are open-ended and appropriate where the researcher wants to hear respondents' opinions in their own words.[13] Additionally, the respondents are relaxed and at ease. It is particularly helpful for people with busy schedules and those who do not want to spend time filling in bulky questionnaires. The disadvantage with unstructured interviews is that there is need for the researcher to monitor closely the direction and depth of the interview.[14] Respondents may digress from the topic and getting them back on track may be difficult. Another disadvantage with unstructured interviews is thought to be that the interviewer's expectations or individual characteristics of the interviewee may influence responses.[15]

Semi structured interviews use guidelines, while still preserving room for manoeuvre in obtaining data. Guidelines are particularly valuable in eliciting required information particularly from participants who are not very literate.[16] Furthermore, study participants are enabled to be spontaneous and self-revealing.[17] A disadvantage with semi-structured interviews, like the unstructured ones, is the likelihood of the interviewer's expectations or individual characteristics of the interviewee influencing responses.[18] Participants sometimes find it difficult to describe accurately what they do and it is difficult to discern whether one is receiving the 'real' or official response.

[11] C. M Judd, E. R Smith and L. H Kidder, *Research Methods in Social Relations* (1986) *op cit* 218. The response rate may be over 80%.
[12] B. Berg, *Qualitative Research Methods for the Social Sciences* (Boston: Allyn and Bacon, 1989) 17-22.
[13] T. Palys, *Research Decisions: Quantitative and Qualitative Perspectives*, 2nd Edition (Toronto: Harcourt Brace, 1997) 164.
[14] R. G Burgess, *In the Field: An Introduction to Field Research* (London: George Allen and Unwin, 1984) Chapter 5 especially 119-120.
[15] *Ibid*, 103-106.
[16] C. Judd et al *op cit* 218.
[17] *Ibid*, 223.
[18] R. Burgess *op cit* 103-106.

(i) Unstructured Interviews

Over a period of six and a half weeks from 27th July to 11th September 2006, un-structured interviews were held with people in various institutions like Makerere University, government and non-government bodies. Those interviewed included the Chief Justice, academics, judges of the superior courts, a magistrate, public and civil servants and individuals. Selection of respondents was based on their knowledge (or lack of) in the area of traditional justice as well as the position they held. The aim of the interviews was to supplement the archival literature by getting a socio-legal perspective on their role, or that of their institutions, in taking into account traditional approaches. The interviews gave insights into the prospects and challenges faced. Some interviewees also gave me written documentation, conference papers, periodicals and books that were otherwise not easily accessible.[19] Follow up interviews were conducted with the Chief Justice, head of the Jopadhola cultural union – Mr. Moses Owor, and the two Jopadhola clan heads in August 2008. The aim was to seek clarification on issues, and obtain supplemental information on clan courts.

In all, 40 respondents were interviewed: 23 men and 17 women, whose details are in Appendix 4. The interviews were conducted in their offices where I took notes of the responses: none of the respondents objected to this. All the respondents were supportive of the research and participated enthusiastically.

(ii) Semi structured interviews

Semi-structured interviews were used in the empirical study among the Jopadhola in two stages: a pre-visit interview, followed by a formal workshop in August 2006. The term 'pre-visit' is used here to refer to the preparatory visit made to the study area prior to the main interviews. The aim was to establish when it was most suitable to carry out the interviews and to select participants. This is standard research practice in Uganda.

The preparation for both the pre-visit and the workshop took three weeks, with the help of administrative assistants who were paid a daily fee.[20] Their tasks were limited to sending out invitations (by bicycle), registration of participants for the workshop and organising meals for the workshop.

[19] These included: Ms F. Anglin, Mr. R. Byaruhanga Ms. E. Edroma Ms. C. Bainemugisha, Mr. M. Wamasebu, Ms. D. Lwanga, Ms. S. Mukasa, Ms. H. Lwabi, Prof. J. Kakooza, Ms T. Webaale, Mr. Musede, Ms R. Nyonyi and Ms S. Katutu, Ms. H. Wolayo and Ms R. Odoi. Details in Appendix 4.

[20] The team was led by a Ms. Nyakecho, an elder and two assistants: (Mr. Omiel) a primary school teacher and (Ms. Achieng) in her final year of occupational therapy. All have grown up and lived in the village; were conversant with the habits and cultures of the area. The three were fluent in written and spoken Adhola and English.

(a) Pre-visit interview

Findings from archival research and unstructured interviews affirmed the pervasive criminal jurisdiction of clan courts among the Jopadhola. I then set up a pre-visit meeting to get more background information about clan court systems and Jopadhola criminal laws. I selected two clan elders for the pre-visit who were most senior and who had an in-depth knowledge of the clan system. They were Mr. A Oketcho the head of Jo-Gem clan and Mr. Y Opondo a high ranking Morwa Guma chief.[21] Both were sent an advance copy of the interview guideline that I had pre-tested on three randomly selected Jopadhola and then re-drafted for accuracy. Preparation for this one day interview took one week and it was held on the 12th August 2006 at Romo House, Gwaragwara Central in Kisoko sub-county.[22]

The semi structured interview sought answers in the following areas:

1. Genealogy of the clan
2. Composition of clan courts by gender, age and numbers
3. Number and structure of clan courts (Hierarchy)
4. Criteria for appointment to clan courts as well as the process of appointment
5. Criminal jurisdiction of clan courts
6. Sentencing jurisdiction of clan courts
7. Common offences, perpetrators and victims
8. Any rituals performed in relation to criminal cases
9. Venue for clan court sittings
10. Amount of clan court fees paid (if at all)
11. Existence of judgments or court records (and a request for copies).

The Jo-Gem leader Mr. Okecho brought detailed written responses to all the questions prepared jointly with the other Jo-Gem clan leaders, while Mr. Opondo gave a verbal response to all questions. I recorded all of Mr. Opondo's responses and then we discussed the answers.

At the end of the interview, I selected 32 participants including Mr. Okecho and Mr. Opondo, comprising 4 members per court. Jo-Gem courts comprise at least 5 people and Morwa Guma courts have between 5-9 members. I was guided in the selection by the two leaders but endeavoured to balance age and sex of the invitees. Furthermore, I selected participants who hold different positions of responsibility in the courts like the chair, judge, assessors, secretaries, women and youth representatives. The Jo-Gem clan

[21] Mr. Y. O was the clan head of Namwaya Saza. The supreme elder of the Morwa Guma clan was unable to attend due to a busy work schedule.

[22] The pre-visit interview lasted the whole day because of the need for an in-depth understanding of the complex court structures prior to the main workshop. Both clan leaders later attended the workshop.

with 3 courts[23] got 12 invites, while the Morwa Guma with 5 courts[24] got 20 invites. Preparation for the next stage of administering the questionnaires lasted 3 days. During this time, I pre-tested the semi structured questionnaire on 4 randomly selected Jopadhola and then redrafted it for accuracy.

(b) Workshop

The second set of semi structured interviews was conducted on Wednesday 15th August 2006,[25] at a one-day workshop at the same venue of Romo House chosen for its central location. All the participants were reimbursed travel expenses. In all, 25 participants attended: 7 women and 18 men. 7 were absent with apology due to other commitments. I divided participants into 7 working groups representing 7 clan courts. Those present were:

1. Gombolola Jo-Gem: chair, assessor, secretary and assistant secretary
2. Miluka Jo-Gem: chair, three assessors and secretary
3. Kisoko Jo-Gem: chair, assessor and secretary
4. P'Oriwa Morwa Guma: judge, grandmother of the clan, official in charge of rituals
5. Saza Morwa Guma: judge, chair, grandmother of the clan, secretary and chair of funeral dues
6. Gombolola Morwa Guma: chair and secretary
7. Miluka Morwa Guma: chair, grandmother of the clan and helper. The chair of the Kisoko Morwa Guma court, being the only attendee, joined the Miluka group.

The separation into groups was made consciously to assess the differences if any between the two clan approaches; more so since each group represented more than one view point. Furthermore, this workshop was the most effective way to get qualitative data because the clan court officials were familiar with one another as members of the 'Bench'. They also spoke the same language-Dhupadhola. The day's events were then divided into four stages: Registration and introduction, group discussions, trial simulation and a plenary discussion.

The first stage was registration at which personal details specifically names, sex, clan, position in the clan court, occupation and any other responsibilities; were recorded in attendance sheets. For those who could not write, an administrative assistant filled in the details, read it back to them, then the participant would put a thumbprint against their details. A complete list of participants and their personal profiles can be found in Appendix 3. Questions on age, marital status and level of education were not included on the registration form, because it is considered culturally insensitive to seek this

[23] In descending hierarchy: Gombolola, Miluka and Kisoko courts.
[24] In descending hierarchy: P`Oriwa, Saza, Gombolola, Miluka and Kisoko courts.
[25] Wednesday was most convenient for most participants because other days are reserved for community functions like the open market.

information in writing. Instead this information was voluntarily given during the formal introductions where participants introduced themselves by stating their name, marital status and clan.[26] Married women stated their father's clan and the husband's clan into which they were married and where relevant, their ethnic group.[27] Introductions were followed by an explanation of the thesis and how the day's events fitted in the wider picture.

The second stage was the administration of the questionnaires as illustrated in Figure 1 and 2.

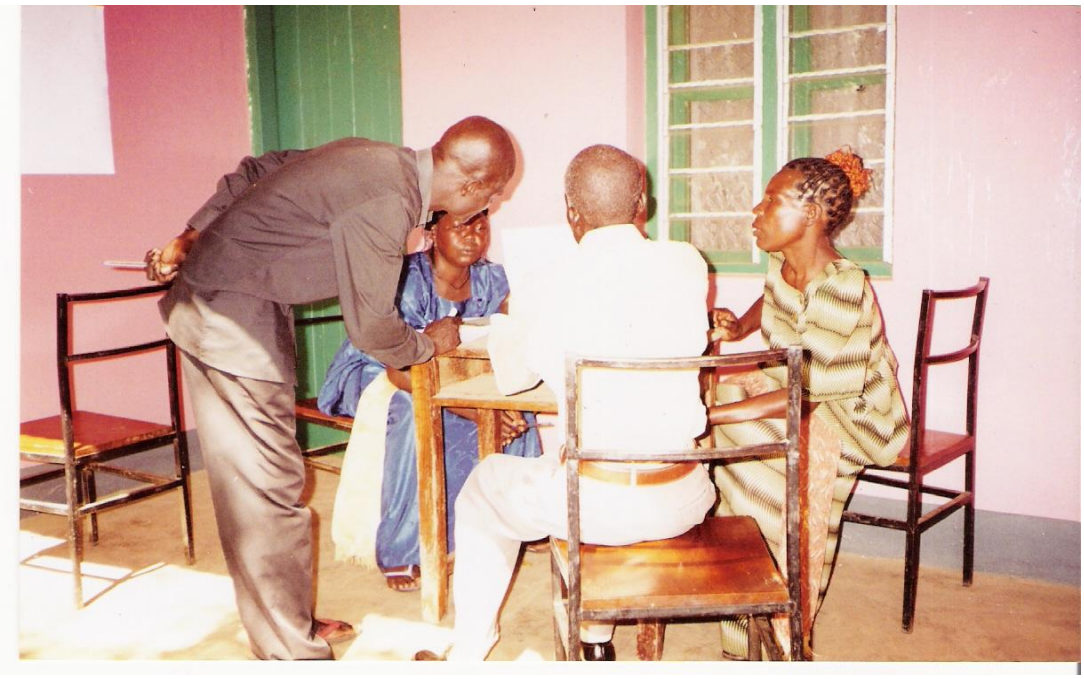


Figure 1: © Maureen Owor (2006). Kisoko Jo-Gem discussion group

Each group was given a question guide in Dhupadhola, flip charts and markers. They read and discussed the questions, then wrote down their responses in Dhupadhola as depicted in Figures 1 above and Figure 2 overleaf. Writing down responses was a better method of documentation than tape recording for two reasons. In the first place all groups were able to digest the questions then answer the questions simultaneously. Secondly, I was able to move from group to group, seek clarity and re-direct the line of discussion where issues and written responses were not clear. Consequently, all the questions were answered in depth and within the time frame.

[26] Being respectful of the culture, I did not record or use information given orally during introductions.
[27] Three female participants were originally from other ethnic groups.

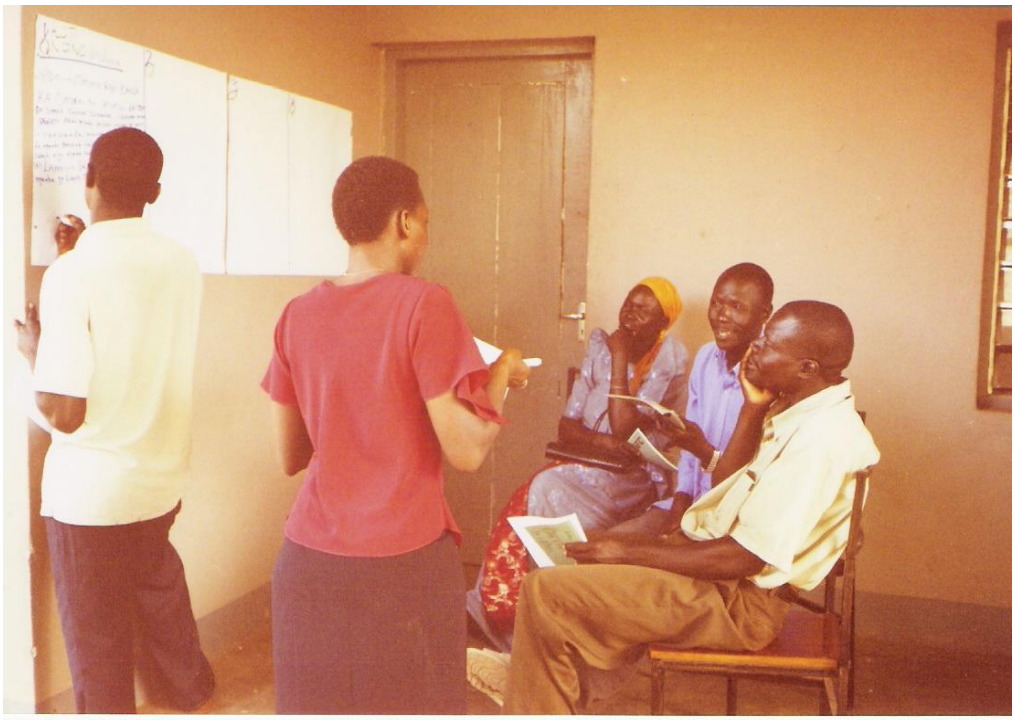


Figure 2: © Maureen Owor (2006). Discussion with the Miluka Morwa Guma group

The method had its drawbacks. From the registration and introductions, it was evident that some participants had received formal education though not all. For example, most of the secretaries to the clan courts were teachers while some of the chairmen and assessors (helpers) were illiterate/semi-literate farmers. As a result, the less literate participants preferred an oral narrative, saying that they had never been asked to document their experiences before. The more literate secretaries were able to articulate their views and write down the answers legibly. However the less literate struggled to express their views in writing, even in Dhupadhola, and their accounts were more truncated. For Kisoko Jo-Gem group, the secretary wrote in Ja-Luo language which was then transcribed into Dhupadhola. The last stage comprised trial simulation- the third type of qualitative research used in this study.

Trial simulation

The study used simulation of a reconstructed trial involving two offenders accused of incest because they were related as same-clan members. The participants selected incest as one of the most common offence tried by clan courts. The choice of trial simulation permitted a controlled study, but did not put the court officials in the position where the decision could have real consequences. The simulation lasted approximately 90 minutes and was done by participants who were real clan court officials acting as defendants, witnesses, court officials and the audience. The simulation applied clan court

procedures and Jopadhola clan law. The success of the trial simulation depended on a high level of authenticity as shown below.

Figure 3: © Maureen Owor (2006). Witnesses give testimony in trial simulation

In this regard, it is worth noting that the participants made it so realistic. One member refused to take part saying the 'trial' would bring him bad luck since it 'involved' his daughter-in-law.[28] The use of trial simulation was to illuminate the hitherto undocumented restorative processes and reasoning that lead to a particular verdict and sentence: this process to me is of more importance than the verdict and sentence itself. As with all trial simulations and empirical studies generally, there is the risk of presentational bias where participants say what they think is socially desirable, or expectancy effect, where the researcher hears what they want to hear.[29] These risks were ameliorated by comparing the results of the trial simulation with archival research- clan court records availed to me by the Namwaya Saza court of Morwa Guma. The findings were the same.

Plenary discussion

Following the trial simulation, the study participants converged in a plenary session and deliberated upon Jopadhola law, sentencing practice and issues concerning

[28] No amount of persuasion could convince Mr. O to participate in the trial simulation.
[29] E. Finch and V. E. Munro, 'Lifting the Veil: The Use of Focus groups and Trial Simulations in Legal Research' (2008) 35 *Journal of Law and Society* 30-51, 39-40.

integration of traditional law in international law. This group deliberation elicited the participants' own analysis of what they perceived as weaknesses and strengths of the clan court system, and practical issues of accommodating international human rights standards. The deliberations were recorded then analysed.

Presentation of results

I transcribed all responses from the pre-visit interview and workshop into the English language since I am proficient in both Dhupadhola and English. The results of the pre-visit interview and workshop were analysed and the responses coded according to the groups. These findings are presented in a thematic form in Chapters 6 and 7 as group responses, trial simulation and plenary discussion. The views elicited from the unstructured interviews are presented in respect of the interviewee's responsibility or institution.[30]

Justification for doing 'Insider' research

According to Jones[31] an insider is a person who conducts research on a cultural, racial or ethnic group of which the researcher is a member. The advantage to this approach is that the researcher has access to the research subjects; gains a better understanding of the phenomenon under study, and the validity of the research findings is accentuated.[32] Since I am a Japadhola, I was able to get access to the subjects quite easily since I knew the 'gate keepers' of the system: elders and youth who had lived and worked in this community for a long period and were conversant with the customs. Furthermore, I knew the traditions and I am fluent in the local language, which opened channels of communication. These are all advantages which an outsider might not have.

Another advantage to being an insider is trustworthiness that enables participants reveal elusive intimate thoughts and revelations.[33] Trust was exemplified in two ways. The first was a request (which I met) for note books so participants could record the day's proceedings and responses on the flip charts for future reference.[34] The second was impromptu speeches following the end of the workshop.[35] The speeches denoted participants' feeling that the exercise had been mutually beneficial to all and that they had

[30] Ch. 6, 7 and 8 *op cit*.
[31] D. J Jones, 'Towards a Native Anthropology' in J. B Cole (ed.) *Anthropology for the Nineties: Introductory Readings* (New York, The Free Press, 1988) 30.
[32] O. O Elechi (2006) *op cit* 235.
[33] Boas cited in D. J Jones *op cit* 36.
[34] To this end, each group's flip charts were pinned up on the walls till the end of the workshop.
[35] There were two speeches from each clan; from male and female speakers, signifying an engaging research exercise.

learnt from each other's practice. Participants expressed their willingness to collaborate with me in future on similar undertakings. These factors arguably authenticate the research findings.

The limitations of an insider perspective are that research subjects may take it for granted that the researcher knows the area very well and do not give all the information.[36] Alternatively, they may assume there is no need to discuss every day affairs with an insider. The outsider would have an advantage in getting this information. To overcome this hurdle, I went into considerable detail and sat with each group, going over all the questions so as to get all the information.

Ethical issues

There were no ethical problems that arose with the study. In accordance with research regulations in Uganda, I applied for and was granted permission to carry out the research by the Research Ethics body: Uganda National Council for Science and Technology (UNCST). I also obtained written permission from the Resident District Commissioners of Kampala and Tororo to conduct research in the two districts:[37] an additional requirement for researchers. This permission was extended in August 2008 and the letters are on the file. Having done some research for the Uganda Law Reform Commission (ULRC) on sentencing reform,[38] I obtained permission from the chair of ULRC to use their draft report for my research.

The participants voluntarily took part in the research. No minors were involved in the study and there was no risk to health, finances or violation of privacy. Standard research protocol in Uganda was observed. Firstly, the choice of language was Dhupadhola, this being the language of the participants. Secondly, the manner of dress was appropriate[39] and thirdly any culturally sensitive questions or comments were avoided. Permission to quote research participants in this thesis was sought and, in all cases, granted.

There were three main limitations. First, the archival research was insufficient. This combined with lack of a reliable source of existing research studies meant I had to rely on individuals giving me their copies of documents or alerting me to the whereabouts of others. Next, some people were unavailable due to various commitments so I was

[36] D. J Jones *op cit* 35.
[37] All the three letters are on the file. Resident District Commissioners are senior civil servants appointed under Article 203 of the Constitution to co-ordinate various administrative functions, including approval for research.
[38] January-October 2003.
[39] Appropriate dress code was: long skirts or dresses, minimal jewellery, simple makeup and hairstyles for ladies, and long trousers for the men.

unable to interview them. Finally, I was not able to attend and observe actual clan court hearings as none were scheduled during this time. Despite these set backs I was able to get sufficient information about the sentencing process from both the respondents and study participants.

APPENDIX 2: SEMI STRUCTURED QUESTIONNAIRE FOR THE CLAN WORKSHOP

1. (a) Describe the trial process.
(b) Who is allowed to make representations?
2. Are there any rituals applied during the sentencing process to (a) the victim, (b) the offender and (c) the community?
3. How do clan courts assess moral culpability and responsibility of the offender?
4. What factors or criteria do you take into account while sentencing an offender?
5. How do you satisfy the wishes of the victim against those of the offender and the community?
6. What procedure is followed if a person is dissatisfied with the decision of the court?
7. Are parties permitted to opt out of or reject trials in the clan courts?
8. Is there any relationship between your court and that of the Local Council court or Magistrate's court?
9. How do you ensure that decisions are fair to all parties so as to prevent bias in decision making?
10. Describe the challenges faced by the clan courts.

APPENDIX 3- LIST OF STUDY PARTICIPANTS: JO –GEM CLAN

Name	**Position in clan court**	**Other responsibility**	**Occupation**
A. Okecho	Chair Gombolola	_	Farmer
D. Okoth	Assessor Gombolola	_	Farmer
H. Onyango	Secretary Gombolola	_	Teacher
C. Ochieng (Ms)	Ass. Secretary, Gombolola	Women Council member	Farmer
C. Opendi	Chair Miluka	Secretary, Rural Bank	Farmer
A. Ogola	Assessor Miluka	Chair, married people	Farmer
F. Akoth (Ms)	Secretary Miluka	Treasurer NAADS	Teacher
L. Okello	Chair Kisoko	Zone leader Gwaragwara church	Farmer
R. Opio (Ms)	Assessor Kisoko	Vice Chair Women's Legion	Farmer
A. Nyadoi (Ms)	Assessor Kisoko	L.C. 1 Treasurer	Farmer
O. Ongwen	Assessor Kisoko	_	Farmer

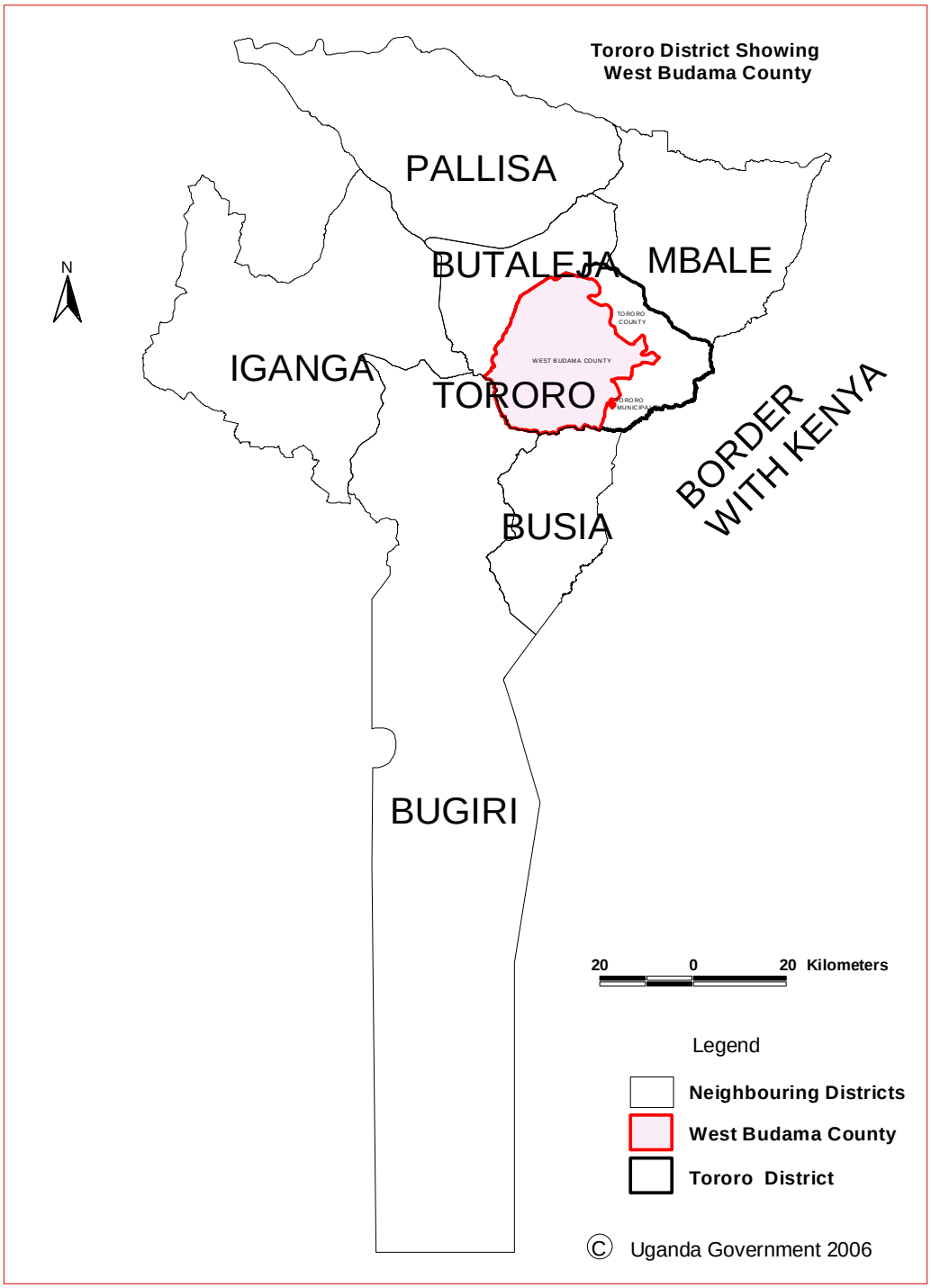
APPENDIX 3: STUDY PARTICIPANTS FROM MORWA GUMA CLAN

Name	Position in clan court	Other responsibility	Occupation
O. Omuge	Judge P`Oriwa	-	Chief
D. Olowo (Ms)	Grandmother P`Oriwa	Secretary Women's group	Teacher
D. Othieno	In charge of rituals P`Oriwa	Retired chief	Farmer
Y. Opondo	Chair Saza	Chair Okwira PTA	Farmer
R. P Odongo	Chief, Namwaya Saza Interviewed on 16/08/08	Minister of Culture, P`Oriwa Cabinet	Public Servant
O. Owere	Judge Saza	Pastor	Security guard
I. B Oboth (Ms)	Women rep. Saza	L.C.1 Sec. for Information	Teacher
S. Olowo	Secretary Saza	Adviser at Parish	Teacher
M. Okongo	Funeral chair, Saza	Committee L.C 1	Farmer
L. Owino	Chair Gombolola	_	Farmer
O. C. Okello	Secretary Gombolola	Chair Local council 1	Farmer
O. Onyango	Miluka Chair	Vice Chair Local Cl. 1	Farmer
J. Okoth	Assessor	_	Self employed
A. Olowo (Ms)	Women rep. Miluka	Chair Local council 1	Farmer
J. Omiel	Kisoko Chair	_	Farmer

APPENDIX 4: LIST OF KEY INFORMANTS

No.	Institution	Name of person and title
1	Tieng Adhola –cultural institution	Mr. Moses Owor – The *Kwar Adhola*
2	Supreme Court of Uganda	Hon. B. J Odoki - The Chief Justice
3	"	Hon. J. W.Tseekoko- Justice of Supreme Court
4	"	Ms. H. Wolayo – Registrar Supreme Court
5	Court of Appeal	Hon. C. K Byamugisha- Justice of Appeal (Ms)
6	"	Hon. C. B Kitumba – Justice of Appeal (Ms)
7	High Court	Hon. I. M. Maitum- High Court Judge (Ms)
8	"	Hon. R. Kasule- High Court Judge
9	"	Ms F. Anglin – Registrar
10	"	Mr. R. Byaruhanga- Registrar (Crime)
11	Chief Magistrates' Court -Tororo	Mr. P. Rutakirwah – Chief Magistrate
12	Sub county chief, Kisoko - Tororo	Mr. Ondhoro
13	Gwaragwara parish chief, Tororo	Mr Tanga
14	UNAFRI	Dr. Masamba-Sita- Director
15	Uganda Judicial Officers Association	Mr. Keitirima – President
16	Justice Law and Order Sector	Ms. E. Edroma – Senior Technical Advisor
17	"	Ms. C. Bainemugisha- JLOS Secretariat
18	"	Ms R. Odoi – Secretary to Transitional Justice Working group
19	Uganda Law Society, Legal Aid Projec	Ms. S. Mukasa – Director Legal Aid clinic
20	Directorate of Public Prosecutions	Ms D. Lwanga- Commissioner
21	"	Mr. M. Wamasebu –Commissioner
22	First Parliamentary Counsel	Ms. H. Lwabi- Parliamentary Counsel
23	Uganda Law Reform Commission	Prof. J. M. N Kakooza – Chair ULRC
24	Law Development Centre	Ms T. Webaale – Head, Legal Aid Project
25	Ministry of Local Government	Mr. J. Musede – Senior Legal Research Officer
26	Makerere University, School of Law	Prof. J. Oloka-Onyango
27	"	Ass. Prof. F. Juuko
28	"	Ass. Prof. L. T. Ekirikubinza (Ms) Pro Vice Chancellor (Academic Affairs)
29	"	Ass. Prof. S. Tamale – Dean (Ms)
30	"	Mr. S. Tindifa – Senior Lecturer
31	" Linguistics Department	Ms. J. Alowo- Senior Lecturer
32	" History Department	Mr. Odoi-Tanga – Senior Lecturer
33	" Sociology Department	Dr. Samula – Head of Department
34	" Philosophy Department	Ass. Prof. E. Wamala- Head of Dept.
35	"	Ass. Prof. E. Beyaraza
36	" Adult Education Dept	Mr. A. Oketch
37	Ministry of Internal Affairs, Community Service Department	Ms R. Nyonyi – National Co-ordinator
38	"	Mr. F. Wamukote – Probation Service Off.
39	"	Mr. P. Mugisa- Probation Service Officer
40	"	Ms. S. Katutu

APPENDIX 5: Map of Tororo district and surrounding districts. Source: Department of Mapping and Surveys



APPENDIX 6: THE PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA, 2003 (selected text)

Section N
6: Rights during a trial:

(a) In criminal proceedings, the principle of equality of arms imposes procedural equality between the accused and the public prosecutor.

1. The prosecution and defence shall be allowed equal time to present evidence.

2. Prosecution and defence witnesses shall be given equal treatment in all procedural matters.

(b) The accused is entitled to a hearing in which his or her individual culpability is determined. Group trials in which many persons are involved may violate the person's right to a fair hearing.

(c) In criminal proceedings, the accused has the right to be tried in his or her presence.

1. The accused has the right to appear in person before the judicial body.

2. The accused may not be tried in absentia. If an accused is tried in absentia, the accused shall have the right to petition for a reopening of the proceedings upon a showing that inadequate notice was given, that the notice was not personally served on the accused, or that his or her failure to appear was for exigent reasons beyond his or her control. If the petition is granted, the accused is entitled to a fresh determination of the merits of the charge.

3. The accused may voluntarily waive the right to appear at a hearing, but such a waiver shall be established in an unequivocal manner and preferably in writing.

(d) The accused has the right not to be compelled to testify against him or herself or to confess guilt.

1. Any confession or other evidence obtained by any form of coercion or force may not be admitted as evidence or considered as probative of any fact at trial or in sentencing. Any confession or admission obtained during incommunicado detention shall be considered to have been obtained by coercion.

2. Silence by the accused may not be used as evidence to prove guilt and no adverse consequences may be drawn from the exercise of the right to remain silent.

(e) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

1. The presumption of innocence places the burden of proof during trial in any criminal case on the prosecution.

2. Public officials shall maintain a presumption of innocence. Public officials, including prosecutors, may inform the public about criminal investigations or charges, but shall not express a view as to the guilt of any suspect.

3. Legal presumptions of fact or law are permissible in a criminal case only if they are rebuttable, allowing a defendant to prove his or her innocence.

(f) The accused has a right to examine, or have examined, witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.

1. The prosecution shall provide the defence with the names of the witnesses it intends to call at trial within a reasonable time prior to trial which allows the defendant sufficient time to prepare his or her defence.

2. The accused's right to examine witnesses may be limited to those witnesses whose testimony is relevant and likely to assist in ascertaining the truth.

3. The accused has the right to be present during the testimony of a witness. This right may be limited only in exceptional circumstances such as when a witness reasonably fears reprisal by the defendant, when the accused engages in a course of conduct seriously disruptive of the proceedings, or when the accused repeatedly fails to appear for trivial reasons and after having been duly notified.

4. If the defendant is excluded or if the presence of the defendant cannot be ensured, the defendant's counsel shall always have the right to be present to preserve the defendant's right to examine the witness.
5. If national law does not permit the accused to examine witnesses during pre-trial investigations, the defendant shall have the opportunity, personally or through defence counsel, to cross-examine the witness at trial. However, the right of a defendant to cross-examine witnesses personally may be limited in respect of victims of sexual violence and child witnesses, taking into consideration the defendant's right to a fair trial.
6. The testimony of anonymous witnesses during a trial will be allowed only in exceptional circumstances, taking into consideration the nature and the circumstances of the offence and the protection of the security of the witness and if it is determined to be in the interests of justice.

(g) Evidence obtained by illegal means constituting a serious violation of internationally protected human rights shall not be used as evidence against the accused or against any other person in any proceeding, except in the prosecution of the perpetrators of the violations.

7. Right to benefit from a lighter sentence or administrative sanction

(a) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit therefrom.
(b) A lighter penalty created any time before an accused's sentence has been fully served should be applied to any offender serving a sentence under the previous penalty.
(c) Administrative tribunals conducting disciplinary proceedings shall not impose a heavier penalty than the one that was applicable at the time when the offending conduct occurred. If, subsequent to the conduct, provision is made by law for the imposition of a lighter penalty, the person disciplined shall benefit thereby.

Section P: VICTIMS OF CRIME AND ABUSE OF POWER

a) Victims should be treated with compassion and respect for their dignity. They are entitled to have access to the mechanisms of justice and to prompt redress, as provided for by national legislation and international law, for the harm that they have suffered.
b) States must ensure that women who are victims of crime, especially of a sexual nature, are interviewed by women police or judicial officials.
c) Sates shall take steps to ensure that women who are complainants, victims or witnesses are not subjected to any cruel, inhumane or degrading treatment.
d) Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.
e) States are required to investigate and punish all complaints of violence against women, including domestic violence, whether those acts are perpetrated by the state, its officials or agents or by private persons. Fair and effective procedures and mechanisms must be established and be accessible to women who have been subjected to violence to enable them to file criminal complaints and to obtain other redress for the proper investigation of the violence suffered, to obtain restitution or reparation and to prevent further violence.
f) Judicial officers, prosecutors and lawyers, as appropriate, should facilitate the needs of victims by:

1. Informing them of their role and the scope, timing and progress of the proceedings and the final outcome of their cases;
2. Allowing their views and concerns to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;
3. Providing them with proper assistance throughout the legal process;
4. Taking measures to minimize inconvenience to them, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;
5. Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

g) Informal mechanisms for the resolution of disputes, including mediation, arbitration and traditional or customary practices, should be utilized where appropriate to facilitate conciliation and redress for victims.

h) Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses, the provision of services and the restoration of rights.

i) States should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.

j) Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws or international law, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted.

k) When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:

1. Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;
2. The family, in particular dependants of persons who have died or become physically or mentally incapacitated.

l) States are encouraged to establish, strengthen and expand national funds for compensation to victims.

m) States must ensure that :

1. Victims receive the necessary material, medical, psychological and social assistance through state, voluntary, non-governmental and community-based means.
2. Victims are informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.
3. Police, justice, health, social service and other personnel concerned receive training to sensitize them to the needs of victims, and guidelines are adopted to ensure proper and prompt aid.

Section Q. TRADITIONAL COURTS

a) Traditional courts, where they exist, are required to respect international standards on the right to a fair trial.

b) The following provisions shall apply, as a minimum, to all proceedings before traditional courts:

1. equality of persons without any distinction whatsoever as regards race, colour, sex, gender, religion, creed, language, political or other opinion, national or social origin, means, disability, birth, status or other circumstances;
2. respect for the inherent dignity of human persons, including the right not to be subject to torture, or other cruel, inhuman or degrading punishment or treatment;
3. respect for the right to liberty and security of every person, in particular the right of every individual not to be subject to arbitrary arrest or detention;

4. respect for the equality of women and men in all proceedings;
5. respect for the inherent dignity of women, and their right not to be subjected to cruel, inhuman or degrading treatment or punishment;
6. adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence;
7. an entitlement to the assistance of an interpreter if he or she cannot understand or speak the language used in or by the traditional court;
8. an entitlement to seek the assistance of and be represented by a representative of the party's choosing in all proceedings before the traditional court;
9. an entitlement to have a party's rights and obligations affected only by a decision based solely on evidence presented to the traditional court;
10. an entitlement to a determination of their rights and obligations without undue delay and with adequate notice of and reasons for the decisions;
11. an entitlement to an appeal to a higher traditional court, administrative authority or a judicial tribunal;
12. all hearings before traditional courts shall be held in public and its decisions shall be rendered in public, except where the interests of children require or where the proceedings concern matrimonial disputes or the guardianship of children;

c)The independence of traditional courts shall be guaranteed by the laws of the country and respected by the government, its agencies and authorities:

1. they shall be independent from the executive branch;
2. there shall not be any inappropriate or unwarranted interference with proceedings before traditional courts.

d) States shall ensure the impartiality of traditional courts. In particular, members of traditional courts shall decide matters before them without any restrictions, improper influence, inducements, pressure, threats or interference, direct or indirect, from any quarter.

1. The impartiality of a traditional court would be undermined when one of its members has:
    - 1.1 expressed an opinion which would influence the decision-making;
    - 1.2 some connection or involvement with the case or a party to the case;
    - 1.3 a pecuniary or other interest linked to the outcome of the case.
2. Any party to proceedings before a traditional court shall be entitled to challenge its impartiality on the basis of ascertainable facts that the fairness any of its members or the traditional court appears to be in doubt.

e)The procedures for complaints against and discipline of members of traditional courts shall be prescribed by law. Complaints against members of traditional courts shall be processed promptly and expeditiously, and with all the guarantees of a fair hearing, including the right to be represented by a legal representative of choice and to an independent review of decisions of disciplinary, suspension or removal proceedings.

R. NON-DEGORABILITY CLAUSE

No circumstances whatsoever, whether a threat of war, a state of international or internal armed conflict, internal political instability or any other public emergency, may be invoked to justify derogations from the right to a fair trial.

APPENDIX 7: AGREEMENT ON ACCOUNTABILITY AND RECONCILIATION BETWEEN THE GOU AND LRA 26TH JUNE 2007

This agreement, between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement (LRA/M) (herein referred to as the Parties), witnesseth that:

Preamble
Whereas the parties:
Having been engaged in protracted negotiations in Juba, Southern Sudan, in order to find just, peaceful and lasting solutions to the long-running conflict, and to promote reconciliation and restore harmony and tranquillity within the affected communities and in Uganda generally;

Conscious of the serious crimes, human rights violations and adverse socio-economic and political impacts of the conflict, and the need to honour the suffering of victims by promoting lasting peace with justice;

Committed to preventing impunity and promoting redress in accordance with the Constitution and international obligations and recalling, in this connection, the requirements of the Rome Statute of the International Criminal Court (ICC) and in particular the principle of complementarity;

Driven by the need for adopting appropriate justice mechanisms, including customary processes of accountability, that would resolve the conflict while promoting reconciliation and convinced that this Agreement is a sound basis for achieving that purpose;

Guided by the objective principle of the Constitution, which directs that there shall be established and nurtured institutions and procedures for the resolution of conflicts fairly and peacefully; and further recalling the Constitutional duty on the courts of Uganda to promote reconciliation.

Now therefore the parties agree as follows:
Definitions: Unless the context suggests otherwise, the following words and phrases shall have the meaning assigned thereto:
"Ailuc" refers to the traditional rituals performed by the Iteso to reconcile parties formerly in conflict, after full accountability.
"Alternative justice mechanisms" refers to justice mechanisms not currently administered in the formal courts established under the Constitution.
"Constitution" means the Constitution of the Republic of Uganda.
"Culo Kwor" refers to the compensation to atone for homicide, as practiced in Acholi and Lango cultures, and to any other forms of reparation, after full accountability.
"Gender" refers to the two sexes, men and women, within the context of society.
"Kayo Cuk" refers to the traditional rituals performed by the Langi to reconcile parties formerly in conflict, after full accountability.
"Mato Oput" refers to the traditional rituals performed by the Acholi to reconcile parties formerly in conflict, after full accountability.
"Reconciliation" refers to the process of restoring broken relationships and re-establishing harmony.
"The Conflict" means the conflict between the Parties in Northern and North-eastern Uganda, including its impacts in the neighbouring countries.
"Tonu ci Koka" refers to the traditional rituals performed by the Madi to reconcile parties formerly in conflict, after full accountability;
"Victims" means persons who individually or collectively have adversely suffered harm

as a consequence of crimes and human rights violations committed during the conflict.

Commitment to accountability and reconciliation
2.1. The Parties shall promote national legal arrangements, consisting of formal and non formal institutions and measures for ensuring justice and reconciliation with respect to the conflict.

2.2. The accountability processes stipulated in this Agreement shall relate to the period of the conflict. However, this clause shall not prevent the consideration and analysis of any relevant matter before this period, or the promotion of reconciliation with respect to events that occurred before this period.

2.3. The Parties believe that a comprehensive, independent and impartial analysis of the history and manifestations of the conflict, especially the human rights violations and crimes committed during the course of the conflict, is an essential ingredient for attaining reconciliation at all levels.

2.4. The Parties agree that at all stages of the development and implementation of the principles and mechanisms of this Agreement, the widest possible consultations shall be promoted and undertaken in order to receive the views and concerns of all stakeholders, and to ensure the widest national ownership of the accountability and reconciliation processes. Consultations shall extend to state institutions, civil society, academia, community leaders, traditional and religious leaders, and victims.
2.5. The Parties undertake to honour and respect, at all times, all the terms of this Agreement which shall be implemented in the utmost good faith and shall adopt effective measures for monitoring and verifying the obligations assumed by the Parties under this Agreement.

Principles of general application
3.1. Traditional justice mechanisms, such as Culo Kwor, Mato Oput, Kayo Cuk, Ailuc and Tonu ci Koka and others as practiced in the communities affected by the conflict, shall be promoted, with necessary modifications, as a central part of the framework for accountability and reconciliation.

Conduct of proceedings
3.2. The Parties recognise that any meaningful accountability proceedings should, in the context of recovery from the conflict, promote reconciliation and encourage individuals to take personal responsibility for their conduct.

3.3. With respect to any proceedings under this Agreement, the right of the individual to a fair hearing and due process, as guaranteed by the Constitution, shall at all times be protected. In particular, in the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.

3.4. In the conduct of accountability and reconciliation processes, measures shall be taken to ensure the safety and privacy of witnesses.
Witnesses shall be protected from intimidation or persecution on account of their testimony. Child witnesses and victims of sexual crimes shall be given particular protection during proceedings.

Cooperation within proceedings
3.5. The Parties shall promote procedures and approaches to enable individuals to cooperate with formal criminal or civil investigations, processes and proceedings.

Cooperation may include the making of confessions, disclosures and provision of information on relevant matters. The application of any cooperation procedures shall not prejudice the rights of cooperating individuals.

3.6. Provisions may be made for the recognition of confessions or other forms of cooperation to be recognised for purposes of sentencing or sanctions.

Legal representation
3.7. Any person appearing before a formal proceeding shall be entitled to appear in person or to be represented at that person's expense by a lawyer of his or her choice. Victims participating in proceedings shall be entitled to be legally represented.

3.8. Provision shall be made for individuals facing serious criminal charges or allegations of serious human rights violations and for victims participating in such proceedings, who cannot afford representation, to be afforded legal representation at the expense of the State.

Finality and effect of proceedings
3.9. In order to achieve finality of legal processes, accountability and reconciliation procedures shall address the full extent of the offending conduct attributed to an individual. Legislation may stipulate the time within which accountability and reconciliation mechanisms should be undertaken.

3.10. Where a person has already been subjected to proceedings or exempted from liability for any crime or civil acts or omissions, or has been subjected to accountability or reconciliation proceedings for any conduct in the course of the conflict, that person shall not be subjected to any other proceedings with respect to that conduct.

Accountability
4.1. Formal criminal and civil justice measures shall be applied to any individual who is alleged to have committed serious crimes or human rights violations in the course of the conflict. Provided that, state actors shall be subjected to existing criminal justice processes and not to special justice processes under this Agreement.

4.2. Prosecutions and other formal accountability proceedings shall be based upon systematic, independent and impartial investigations.

4.3. The choice of forum for the adjudication of any particular case shall depend, amongst other considerations, on the nature and gravity of the offending conduct and the role of the alleged perpetrator in that conduct.

4.4. For purposes of this Agreement, accountability mechanisms shall be implemented through the adapted legal framework in Uganda.

Legal and institutional framework
5.1. The Parties affirm that Uganda has institutions and mechanisms, customs and usages as provided for and recognised under national laws, capable of addressing the crimes and human rights violations committed during the conflict. The Parties also recognise that modifications may be required within the national legal system to ensure a more effective and integrated justice and accountability response.

5.2. The Parties therefore acknowledge the need for an overarching justice framework that will provide for the exercise of formal criminal jurisdiction, and for the adoption and recognition of complementary alternative justice mechanisms.

5.3. Alternative justice mechanisms shall promote reconciliation and shall include traditional justice processes, alternative sentences, reparations, and any other formal institutions or mechanisms.

5.4. Insofar as practicable, accountability and reconciliation processes shall be promoted through existing national institutions and mechanisms, with necessary modifications. The Parties shall consult on the need to introduce any additional institutions or mechanisms for the implementation of this Agreement.

5.5. The Parties consider that the Uganda Human Rights Commission and the Uganda Amnesty Commission are capable of implementing relevant aspects of this Agreement.

Legislative and policy changes
5.6. The Government will introduce any necessary legislation, policies and procedures to establish the framework for addressing accountability and reconciliation and shall introduce amendments to any existing law in order to promote the principles in this Agreement.

Formal justice processes
6.1. Formal courts provided for under the Constitution shall exercise jurisdiction over individuals who are alleged to bear particular responsibility for the most serious crimes, especially crimes amounting to international crimes, during the course of the conflict.

6.2. Formal courts and tribunals established by law shall adjudicate allegations of gross human rights violations arising from the conflict.

Sentences and Sanctions
6.3. Legislation shall introduce a regime of alternative penalties and sanctions which shall apply, and replace existing penalties, with respect to serious crimes and human rights violations committed by non-state actors in the course of the conflict.

6.4. Alternative penalties and sanctions shall, as relevant: reflect the gravity of the crimes or violations; promote reconciliation between individuals and within communities; promote the rehabilitation of offenders; take into account an individual's admissions or other cooperation with proceedings; and, require perpetrators to make reparations to victims.

Reconciliation
7.1. The Parties shall promote appropriate reconciliation mechanisms to address issues arising from within or outside Uganda with respect to the conflict.

7.2. The Parties shall promote collective as well as individual acts and processes of reconciliation shall be promoted at all levels.

7.3. Truth-seeking and truth-telling processes and mechanisms shall be promoted.

Victims
8.1. The Parties agree that it is essential to acknowledge and address the suffering of victims, paying attention to the most vulnerable groups, and to promote and facilitate their right to contribute to society.

8.2. The Government shall promote the effective and meaningful participation of victims in accountability and reconciliation proceedings, consistently with the rights of the other parties in the proceedings. Victims shall be informed of the processes and any decisions affecting their interests.

8.3. Victims have the right of access to relevant information about their experiences and to remember and commemorate past events affecting them.

8.4. In the implementation of accountability and reconciliation mechanisms, the dignity, privacy and security of victims shall be respected and protected.

Reparations
9.1. Reparations may include a range of measures such as: rehabilitation; restitution; compensation; guarantees of non-recurrence and other symbolic measures such as apologies, memorials and commemorations. Priority shall be given to members of vulnerable groups.

9.2. The Parties agree that collective as well as individual reparations should be made to victims through mechanisms to be adopted by the Parties upon further consultation.

9.3. Reparations, which may be ordered to be paid to a victim as part of penalties and sanctions in accountability proceedings, may be paid out of resources identified for that purpose.

Gender
In the implementation of this Agreement, a gender-sensitive approach shall be promoted and in particular, implementers of this Agreement shall strive to prevent and eliminate any gender inequalities that may arise.

Women and girls
In the implementation of this Agreement it is agreed to:
(i) Recognise and address the special needs of women and girls.
(ii) Ensure that the experiences, views and concerns of women and girls are recognised and taken into account.
(iii) Protect the dignity, privacy and security of women and girls.
(iv) Encourage and facilitate the participation of women and girls in the processes for implementing this agreement.

Children
In the implementation of this Agreement it is agreed to:
(i) Recognise and address the special needs of children and adopt child-sensitive approaches.
(ii) Recognise and consider the experiences, views and concerns or children.
(iii) Protect the dignity, privacy and security of children in any accountability and reconciliation proceedings.
(iv) Ensure that children are not subjected to criminal justice proceedings, but may participate, as appropriate, in reconciliation processes.
(v) Promote appropriate reparations for children.
(vi) Encourage and facilitate the participation of children in the processes for implementing this Agreement.

Resources
The Government will avail and solicit resources for the effective implementation of this Agreement.

Obligations and undertakings of the parties
The Parties:
14.1. Expeditiously consult upon and develop proposals for mechanisms for implementing these principles.

14.2. Ensure that any accountability and reconciliation issues arising in any other agreement between themselves are consistent and integrated with the provisions of this Agreement.

The Government:
14.3. Adopt an appropriate policy framework for implementing the terms of this Agreement.

14.4. Introduce any amendments to the Amnesty Act or the Uganda Human Rights Act in order to bring it into conformity with the principles of this Agreement.

14.5. Undertake any necessary representations or legal proceedings nationally or internationally, to implement the principles of this Agreement.

14.6. Address conscientiously the question of the ICC arrest warrants relating to the leaders of the LRA/M.

14.7. Remove the LRA/M from the list of Terrorist Organisations under the Anti-Terrorism Act of Uganda upon the LRA/M abandoning rebellion, ceasing fire, and submitting its members to the process of Disarmament, Demobilisation, and Reintegration.

14.8. Make representations to any state or institution which has proscribed the LRA/M to take steps to remove the LRA/M or its members from such list.

The LRA/M:
14.9. The LRA/M shall assume obligations and enjoy rights pursuant to this Agreement.
14.10. The LRA/M shall actively promote the principles of this Agreement.

Adoption of mechanisms for implementing this Agreement
15.1. The Parties shall negotiate and adopt an annexure to this Agreement which shall set out elaborated principles and mechanisms for the implementation of this Agreement. The annexure shall form a part of this Agreement.

15.2. The Parties may agree and the Mediator will provide additional guidance on the matters for the Parties to consider and consult upon in the interim period, in developing proposals for mechanisms for implementing this agreement.

Commencement
This agreement shall take effect upon signature.

Signed by:
Dr. S. P. Kagoda
for Government of Uganda

Martin Ojul for LRM/A

Witnessed by: H.E Lt. Gen. Riek Machar Teny-Dhurgon, H.E Japheth R Getugi and H.E Ali I Siwa

Signed on June 29, 2007 available at:
http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/LRON-7CTEZN-full_report.pdf/$File/full_report.pdf

APPENDIX 8 ANNEXURE TO THE AGREEMENT ON ACCOUNTABILITY AND RECONCILIATION, 19 FEBRUARY 2008[40] (relevant extracts)

THE Annexure to the Agreement on Accountability and Reconciliation signed between the Government of the Republic of Uganda (the Government) and the Lord's Resistance Army/Movement (LRA/M) (the Parties) on 29th June 2007 (the Principal Agreement) provides as follows:

The parties

Having signed the Principal Agreement by which the parties committed themselves to implementing accountability and reconciliation with respect to the conflict;

Pursuant to the terms of the principal agreement calling for the adoption of mechanisms for implementing accountability and reconciliation;

Having carried out broad consultations within and outside Uganda, and in particular, with communities that have suffered most as a result of the conflict;

Having established through consultations under Clause 2.4 of the principal agreement, that there is national consensus in Uganda that adequate mechanisms exist or can be expeditiously established to try the offences committed during the conflict;

Recalling their commitment to preventing impunity and promoting redress in accordance with the Constitution and international obligations, and recalling, in this connection, the requirements of the Rome Statute of the International Criminal Court (ICC) and in particular the principle of complementarity;

Confident that the Principal Agreement embodies the necessary principles by which the conflict can be resolved with justice and reconciliation and consistent with national and international aspirations and standards;

Now therefore agree as follows:

Primacy of the Principal Agreement

1. This Annexure sets out a framework by which accountability and reconciliation are to be implemented pursuant to the principal agreement, provided that this annexure shall not in any way limit the application of that agreement, whose provisions are to be implemented in full.
2. The government shall expeditiously prepare and develop the necessary legislation and modalities for implementing the principal agreement and this annexure ('the agreement').
3. The government, under clause 2 above, shall take into account any representations from the parties on findings arising from the consultations undertaken by the parties and any input by the public during the legislative process.

Legal and Institutional Framework (Principal Agreement: Part 5)

7. A special division of the High Court of Uganda shall be established to try individuals who are alleged to have committed serious crimes during the conflict.
8. The special division of the High Court shall have a registry dedicated to the work of the division and in particular, shall make arrangements to facilitate the protection and participation of witnesses, victims, women and children.

[40] Available at AI Index: AFR 59/001/2008: http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/LRON-7CTEZN-full_report.pdf/$File/full_report.pdf visited on 17/03/09.

9. For the proper functioning of the special division of the court in accordance with the agreed principles of accountability and reconciliation, legislation may provide for:
(a) The constitution of the court;
(b) The substantive law to be applied;
(c) Appeals against the decisions of the court;
(d) Rules of procedure;
(e) The recognition of traditional and community justice processes in proceedings.

Reparations (Principal Agreement: Clauses 6.4 & 9)
16. The government shall establish the necessary arrangements for making reparations to victims of the conflict in accordance with the terms of the principal agreement.
17. Prior to establishing arrangements for reparations, the government shall review the financial and institutional requirements for reparations, in order to ensure the adoption of the most effective mechanisms for reparations.
18. In reviewing the question of reparations, consideration shall be given to clarifying and determining the procedures for reparations.

Traditional Justice (Principal Agreement: Clause 3.1)
19. Traditional justice shall form a central part of the alternative justice and reconciliation framework identified in the principal agreement.
20. The government shall, in consultation with relevant interlocutors, examine the practices of traditional justice mechanisms in affected areas, with a view to identifying the most appropriate roles for such mechanisms. In particular, it shall consider the role and impact of the processes on women and children.

21. The Traditional Justice Mechanisms referred to include:
i. Mato Oput in Acholi, Kayo Cuk in Lango, Ailuc in Teso, Tonu ci Koka in Madi and Okukaraba in Ankole; and
ii. Communal dispute settlement institutions such as family and clan courts.
22. A person shall not be compelled to undergo any traditional ritual.

Provisions of General Application
23. Subject to clause 4.1 of the principal agreement, the Government shall ensure that serious crimes committed during the conflict are addressed by the special Division of the High Court; traditional justice mechanisms; and any other alternative justice mechanism established under the principal agreement, but not the military courts.
24. All bodies implementing the agreement shall establish internal procedures and arrangements for protecting and ensuring the participation of victims, traumatised individuals, women, children, persons with disabilities and victims of sexual violence in proceedings.
25. In the appointment of members and staff of institutions envisaged by the Agreement, overriding consideration shall be given to the competences and skills required for the office, and gender balance shall be ensured.
26. The mediator shall from time to time receive or make requests for reports on the progress of the implementation of the agreement.

APPENDIX 9: OVERVIEW OF SENTENCES UNDER NATIONAL LAW

Sentences are contained in the laws governing trials in the magistrates' courts and High Court.[41] Offences are set out in the Penal Code Act that prescribes punishments for various categories of offence. The High Court has the jurisdiction to pass any lawful sentence or combination of sentences.[42] In magistrates' courts, sentencing jurisdiction is graded under S. 162 MCA and Part XV. For example, under S. 162 (1) (a), a chief magistrate may pass any sentence authorised by law including life imprisonment, but not a death sentence. The choice of sentence is pre-determined for offences. Except for offences with mandatory sentences, the judge or magistrate has wide discretion in determining the sentence.[43] The penalties contain some elements of retribution, rehabilitation and reparation.

An extreme retributive sentence is the death penalty that is carried out by hanging[44] although pregnant women and juvenile offenders are exempt.[45] The death sentence is mandatory for certain offences[46] and discretionary for others.[47] The only court with the jurisdiction to pass a death sentence is the High Court under S.2 (1) TIA. Other sentences with retributive aims include life imprisonment (held to involve a maximum tariff of 20 years imprisonment).[48] For example, incest may attract a maximum sentence of life

[41] The Magistrates Courts Act (MCA) and Trial on Indictments Act (TIA). An earlier analysis of punishments in Uganda's penal legislation can be found in F. Ayume *op cit* 163- 205 and D. Nsereko (1995) Chapter 8 *op cit*. A more recent appraisal of sentencing is in the *Draft Sentencing Report* (2006) *op cit* and *A study on sentencing* (2001) *op cit.*

[42] TIA *op cit* Parts VIII, IX and S.2 (1) except where a young offender is tried with an adult, in which case the High Court must remit the case back to the Family and Children Court for sentencing under S. 104(2) Children Act *op cit*.

[43] *A study on sentencing* (2001) *op cit* para 40.1

[44] S. 99 TIA *op cit*.

[45] *Ibid*, S. 103 and 105. These provisions incorporate Article 6 ICCPR that proscribes the passing of a death sentence on a person below 18, or a pregnant woman. Uganda has not signed the 2nd optional protocol to the ICCPR aimed at the abolition of the death penalty, but is party to the 1st optional protocol: General Assembly Resolution 44/128:15th December 1989. Nonetheless, Economic Social Council Resolution 1984/50 on safeguards guaranteeing protection of the rights of those facing the death penalty is applicable to Uganda.

[46] Penal Code *op cit:* Murder (S.189), Treason (S.23) kidnap or detention with intent to murder (S. 243(1)), aggravated robbery (S.286 (2)).

[47] *Ibid,* for example: Rape (S.124), misprision of treason (S.25) and terrorism (S.7 (1) (b) of the Anti-Terrorism Act 14 of 2002.

[48] *Livingstone Kakooza v Uganda* Sup. Ct. Cr. Appeal No.17/93, interpreting the Prisons Act Cap 304 S.86 (6) (now S.84 Prisons Act 17 of 2006).

imprisonment if the victim is below 18 years of age.[49]Another retributive punishment is mandatory imprisonment following previous convictions under the Habitual Criminals (Prevention Detention) Act, Cap 118.[50] There are also discretionary sentences of imprisonment.

Rehabilitation may be ordered where a defendant is found to be guilty but insane. The Minister responsible for Justice makes an order for the defendant to be confined in a mental hospital, prison or suitable place of custody.[51]

Reparative sentences include fines, costs, compensation, restitution, reconciliation and community service orders. Additionally, the constitution promotes the application of compensation and reconciliation by the courts in criminal cases.[52] Such sentences conform to traditional norms of reparation as well as the United Nations Tokyo Rules that promote use of non custodial measures.[53]

Fines may be paid to defray expenses incurred by the prosecution.[54] Costs are paid to the defendant following acquittal, or to the prosecutor. However, the victim may not get costs from the defendant.[55] Where compensation may be paid to the victim it is at the court's discretion and covers only material loss or personal injury.[56] In other instances like robbery, the court shall order mandatory compensation in addition to imprisonment[57] but the compensation order is deemed to be a decree under the Civil Procedure Act and executed under the provisions of that Act.[58] Therefore to get compensation, a victim may have to file a civil suit. If victims are impecunious, they may not be able to afford legal services; moreover there is no legal aid for civil cases. The Poor Persons Defence Act,[59] as the title suggests, only provides for legal aid in criminal cases.

[49] For other categories of offender, incest attracts a maximum of 7 years imprisonment: S. 149 (1) PC *op cit*.
[50] MCA *op cit* S. 163 permits the court to apply Cap 118. Under S.1 Cap 118, the court takes into account at least three previous convictions since the offender reached the age of 16 and was, in at least two of them, sentenced to imprisonment.
[51] MCA *ibid* S. 117 and TIA *op cit* S.48
[52] Uganda constitution *op cit.* Under Art.126 (2) (c): 'adequate compensation shall be awarded to victims of wrongs and under Article126 (2) (d): 'reconciliation between parties shall be promoted.'
[53] The United Nations Standard Minimum Rules for Non-custodial Measures called 'The Tokyo Rules' adopted by General Assembly Resolution 45/110 of 14 December 1990.
[54] S. 180, S. 199 (1) MCA *op cit* and S.110, S.128 (1) TIA, *op cit.*
[55] *Ibid*, S. 195 (1) MCA, S.125 (1) TIA.
[56] *Ibid*, S.197 (1) MCA, S. 126 (1) TIA. Compensation may be paid to the prosecutor if the case is deemed to be frivolous.
[57] Penal Code *op cit* S.270, if a person if convicted of robbery, embezzlement or causing financial loss they must pay compensation.
[58] S. 25 Civil Procedure Act Cap 71 (2000 edition). The decree may be executed in various ways prescribed in S. 38 for example by attachment and sale or arrest and detention in prison.
[59] Poor Persons Defence Act Cap 20 (2000 edition) S.2 is on the provision of legal aid in criminal matters.

Restitution may be ordered following a conviction for theft or receiving or retaining stolen property under the Penal Code Act. Magistrates' courts and the High Court may also order that the stolen property be returned to the owner.[60]

Magistrates' courts under S. 160 MCA, may promote reconciliation and facilitate a settlement amicably by ordering payment of compensation, a stay of the proceedings, or other terms approved by the court. This is in cases of assault, offences of a personal or private nature, and any other offences that do not amount to a felony. For offences that are trivial in nature or where there are extenuating circumstances, the court may discharge without punishment or convict and caution the defendant.[61]

Under the Community Service Act, the community sentence is imposed only for minor offences.[62] The offender is supervised to ensure they complete the work. The sentence is calculated according to a grid, based on information provided by the Probation and Welfare officer.[63] Community service resonates with traditional sentences in parts of Uganda where it is a legitimate punishment.[64]

Finally, there are restrictions on the application of some sentences. For example, where sentences are fixed by law, probation orders are not available under S. 2 (1) of the Probation Act, Cap 122. Likewise, a suspended sentence is only given by an appellate court under S.331 (3)-(10) of the Criminal Procedure Code.

[60] S. 201 (1) (2) MCA *op cit*, and S. 130(1) (2) TIA *op cit*.

[61] *Ibid*, S. 190 MCA (1) (a) and TIA (b), S. 119 (1) (a) and (b).

[62] Community Service Act Cap 115, S.2. S. 3 states that a person convicted of a minor offence may be sentenced to community service.

[63]Community Service Regulations 2001 SI 55-2001, s.15. Second schedule Part B, provides for making an assessment on whether the offender can be re-integrated into the community. This includes finding out: attitudes of the victim, the possibility of encouraging reconciliation; and risks to the community, offender and victim. A detailed critique of the effectiveness of community service is undertaken by C. Birungi, *Community Service in Uganda as an Alternative to Imprisonment: a Case Study of Masaka and Mukono Districts*, Unpublished MA Thesis, University of Western Cape, South Africa, (2005).

[64] JLOS Criminal Justice Baseline Survey (2002) *op cit* 124 established that 26% of households surveyed in northern Uganda support community service as a punishment on the ground that it resonates with the traditional restorative penalty (of community service). My interview on 5th September 2006 and 8th August 2008 with officials from the Community Service Department, confirmed this finding. Furthermore, a pilot National Community Service project in the Acoli sub region and Karamoja, attempts to integrate a traditional system called *Awitong* (the spear), by calling upon the elders to give information to the national courts on the underlying social problem that led to the crime. Elders are expected to give counselling, supervise offenders doing community service and act as sureties. Preliminary results from Karamoja, however, show that integration may be difficult because the two systems (state and traditional) run parallel: *Administration of community service orders in conflict areas and internally displaced peoples camps: Acoli and Lango sub region*, National Community Service Committee (Kampala, July 2004) and *Incorporating traditional administration of justice into community service in Karamoja*, research concept note, National Community Service Committee (Kampala, July 2004).

APPENDIX 10: BACKGROUND TO THE LOCAL COUNCIL COURT LEGISLATION

The origins of the resistance committee courts (now called 'local council courts'), can be traced to the 1981-1986 guerrilla war waged by Yoweri Museveni. They started as committees whose aim was to provide support to the guerrilla fighters. Later the mandate expanded to control of law and order.[65] There is little literature about the resistance council operations in the 'bush' as courts.[66] Resistance committee courts originally operated as part of the socio-political liberation struggle against the Obote II regime (1981-1986), then later became part of the state machinery in 1986. The courts were founded on a promise by the National Resistance government to make 'justice available for all.'[67] Resistance committee courts were preceded by the 1987 Resistance Councils and Committees Statute that established local administrative units comprising lay people, including women and youth representatives, who combined legislative, executive and judicial powers.[68] Although the statute gave the impression of independence, in reality there was political control through supervisory powers of the Minster of Local Government.[69]

A commission of inquiry into local government in Uganda pointed out that the context in which the courts operated had changed following the 1986 war. They usurped judicial and even security functions. Nevertheless, the commission recommended that since the courts were popular, their autonomy should not be limited.[70] Notably, the 1987 Statute provided that under S.11 (2), no person could be disqualified from serving on the court, on account of being illiterate in the official language (English).

The National Resistance Council later passed the Resistance Councils and Committees (Judicial Powers) Statute 1988.[71] Under S. 3 (5), questions arising before the resistance committee court were to be determined by consensus and in default, by a

[65] Y. Museveni (2007) *op cit* 192-193.
[66] J. Barya and J. Oloka-Onyango *op cit* paras 1.1 and 1.4
[67] *Ibid* at page 11 referring to President Museveni's address to the Uganda Law Society in 1987.
[68] Resistance Councils and Committees Statute 9 of 1987, Section 6. The section established the Resistance Councils as a policy making organs a the local government level, with the power to formulate development plans and make by-laws. Each council had Resistance Committees to implement both the council and government policies and assist in maintenance of law and order. Under S. 10(1), the Resistance Committee comprised 9 persons elected by adult suffrage, handling matters relating to youth, women, information, mass mobilisation and education, security and finance.
[69] *Ibid*. Under S. 6 (c) the council would perform functions as delegated to it by the Minster for Local Government.
[70] Ministry of Local Government *Report of the Commission of Inquiry into the Local Government System*, (Kampala, June 1987) paras. 54-57 and 58 (d).
[71] Resistance Councils and Committees (Judicial Powers) Statute 1 of 1988.

majority of members sitting. There were no procedural rules: S. 15(2) enjoined the courts to apply rules of natural justice. For instance, under S.15 (2) (a), each party had to be given an opportunity to be heard. The courts were obliged to hear every case expeditiously and without undue regard to technical rules of evidence and procedure: S. 15(2). Under S. 12(2), no parties to the suit could be represented by an advocate unless proceedings were in respect of a violation of a council's by-laws. Further, the court was permitted to determine its language which would in most cases be the indigenous language of the locality.[72] Jurisdiction was limited to specific aspects of a civil customary nature like 'impregnation of or elopement with a girl under 18 years of age.'[73] The statute gave the right to appeal to the Chief Magistrate who also had supervisory powers under S. 26 (2) (d).

The 1988 statute was replaced with the Executive Committees (Judicial Powers) Act that gave the courts criminal jurisdiction over young offenders.[74] There were no changes to the provisions on decision making and natural justice- S. 17 (2) and S. 19, or determination of questions by consensus under S. 4(5). The Act also provided rather vaguely in S.14, that all proceedings and records would be in the language of the court.

Under the Local Councils Courts Act, 2006, the courts were renamed the local council courts. Their powers are streamlined so that under S. 10 they only handle, among others, specified civil customary cases and criminal matters relating to children. Procedure and decision making is the same as before,[75] like determination of questions by consensus under S. 8(2) (8), expeditious disposal of cases without undue regard to legal technicalities and the application of rules of natural justice.[76] Significantly, local council courts comprise local council committee officials who combine legislative, executive and judicial functions.[77]

[72] *Ibid* S. 14 (1) (2). J. Barya and J. Oloka-Onyango *op cit* 28.
[73] Statute 1 of 1988 *op cit*, Schedule 2. Other matters were cases involving land, marital status of women, paternity of children and identity of customary heirs and customary bailment.
[74] The Executive Committees (Judicial Powers) Act Cap 8 (2000 edition) S. 6
[75] Local Councils Courts Act, Act 13 of 2006: S. 8(7) and Part VIII.
[76] *Ibid*, S. 23, S. 24 and right of appeal in S.32. The content was the same as previous legislation.
[77] *Ibid*, S.4. The lower level local council courts comprise the entire executive committee including women and youth representatives of the village or parish. Legislative and executive functions are governed by the Local Government Act Cap 243.